

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 9 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

SAMUEL CHAMBERS,
Plaintiff,
vs.
DONNA SHALALA, SECRETARY OF HEALTH
AND HUMAN SERVICES,
Defendant.

No. 92-C-948-E

ENTERED ON DOCKET

DATE 2-10-95

O R D E R

Before the Court is the appeal of the plaintiff Samuel Chambers (Chambers) to the Secretary's denial of disability benefits.

Chambers was found disabled in 1983, as a result of a leg injury from a motorcycle accident in 1983, and was awarded disability benefits. In 1987, it was determined that he was no longer disabled, and his benefits were terminated. He pursued his administrative remedies, and, in November, 1989, the Administrative Law Judge entered a denial decision, which was not timely appealed to the Appeals Council. In 1991, he filed a new application for benefits which was ultimately denied by the Appeals Council in 1992.

The evidence reveals that Plaintiff is 45 years old, and completed the 11th grade. His past relevant work includes work as an insulation installer, well drilling operator, and security guard. He has not worked since 1983. His back and leg were injured in the motorcycle accident, and he claims that he cannot work now because of pain from his back and legs, headaches,

dizziness and blackouts from high blood pressure, and shoulder problems. He testified that he was depressed, that he could sit comfortably for one hour, stand for two hours, lift 20 to 25 pounds, and walk a couple of blocks. He also testified that he could do light housework, cook, watch TV, read, fish, visit with relatives, exercise daily (including lifting up to 75 pounds), and drive "sometimes."

Randall Hendricks, M.D. reported Plaintiff to be disabled, but capable of sedentary work after examining him in 1989. In the record from Plaintiff's hospitalization at Doctors Medical Center in August, 1989, he was found to have low back pain secondary to bulging disc syndrome with a prognosis of fair to poor. Ashok Kache, M.D. reported Plaintiff to have a permanent partial disability as a result of chronic back pain since the accident. In 1991, Gary Davis, M.D., Plaintiff's treating physician, reported Plaintiff indicated "no duty secondary to low back pain until further notice."

Plaintiff's leg was noted in 1989 to have healed satisfactorily, and Dr. Davis found that while he was precluded from performing "heavy manual labor" he could perform less strenuous work. In a mental evaluation in 1990, Plaintiff was found to have no significant impairment. It was noted that Plaintiff's "primary concern was to receive social security disability." In 1991, consultative physician, Dr. J.E. Sutton found that plaintiff did "not have much in the way of objective back problems, and in fact he did not have any objective evidence for any type of disability." Dr. T.A. Goodman found no

psychological basis for Plaintiff's headaches, dizziness or his complaints of chronic pain and noted that Plaintiff did not appear to be in pain.

The vocational expert, Dr. Young, testified that Plaintiff could return to his past work as an installation installer, as well as other medium and light jobs. Based on this testimony, the ALJ found that Plaintiff could return to his past work or perform other light or medium work. Plaintiff claims that there is not substantial evidence to support the ALJ's finding that he is not disabled because he could return to his past work as an installation installer, as well as other medium and light jobs.

Legal Analysis

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)
2. A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).
3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).
4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).
5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes V. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d at 750 (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

In this case, the ALJ reached only the fourth step of the

sequential evaluation, finding that Plaintiff was capable of performing his past relevant work as well as other medium and light jobs. Plaintiff claims that the Administrative Law Judge erred in disregarding his testimony of severe and disabling pain, in failing to consider his impairments in combination, and in finding that he could perform medium work (which requires a person to stand and/or walk for 6 hours out of an 8-hour workday and lift up to 50 pounds). Thus, two issues are presented on appeal: 1) was the ALJ's finding that the plaintiff was not credible on his complaints of pain supported by substantial evidence, and 2) was the ALJ's finding that the plaintiff could perform his past work or other medium to light work supported by substantial evidence.

The First issue, as to the Plaintiff's credibility on his complaints of severe and disabling pain should be analyzed using the framework provided in Luna v. Bowen, 834 F.2d 161, 613 (10th Cir. 1987). Thus, the decision maker must consider all of the evidence presented to determine whether the claimant's pain is disabling, including medical data, other objective indications of the degree of the pain, and subjective accounts of the severity of the pain. Id. at 163. Factors to be considered include the claimant's persistent attempts to find relief from pain and his willingness to try prescribed treatment, regular use of crutches or a cane, regular contact with a doctor, the possibility that psychological disorders combine with physical problems, the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Id. at 165-66.

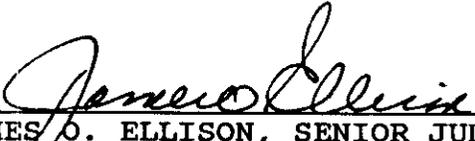
The ALJ found that Plaintiff was not suffering from a totally disabling pain syndrome according to the criteria of Luna v. Bowen. This finding is supported by substantial evidence. Dr. Sutton noted that there was no objective evidence to support Plaintiff's pain. Moreover, while Plaintiff did seek medical care, and take medication, his only testimony about the side effect of the medication was that it made him drowsy, but he did not testify as to how often he suffered from drowsiness. He did not use crutches or a cane, and testified to being fairly active on a daily basis. Psychiatrically, his complaints were found to be vague and inconsistent, and Dr. Goodman found that Plaintiff did not have any psychiatric disorder, but was more likely malingering or motivated by secondary gain.

The medical and vocational evidence also supports the ALJ's finding that Plaintiff is capable of returning to his previous work. Dr. Sutton noted that "The patient does not have much in the way of objective evidence for back problems. He has had a rather extensive workup, including myelogram, EMG, etc. These studies were all normal." Dr. Goodman similarly found that Plaintiff was psychiatrically able to return to work.

Although there is contrary evidence by other physicians, the ALJ enunciated legitimate reason for discounting their opinions. He found that the opinion of Dr. Gary Davis, Plaintiff's treating physician should be discounted because his records contain no objective findings to support his conclusion that Chambers is suffering from disabling low back pain. A treating physician's

testimony must be given great weight, but may be rejected if it is determined to be brief, conclusory, and unsupported by medical evidence. Bernal v. Heckler, 851 F.2d 297, 301 (10th Cir. 1989). Similarly, he discounts the findings of Dr. Kache, noting that his conclusion is clearly based on the claimant's subjective complaints rather than objective findings.

Chambers' appeal is denied.

 7/9/95

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OKLAHOMA

Stephanie

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RESOLUTION TRUST CORPORATION, :
AS RECEIVER OF SOONER FEDERAL :
SAVINGS ASSOCIATION, :
 :
Plaintiff, :

FEB - 9 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

vs. : Case No. 92-C-1042E

FINANCIAL INSTITUTIONS :
RETIREMENT FUND, in its :
capacities as a pension plan :
and trust and as plan sponsor :
of The Comprehensive Retirement :
Program; and THE BANK OF NEW :
YORK, as Trustee of The :
Comprehensive Retirement Program, :
 :
Defendants. :

ENTERED ON DOCKET
DATE 2-10-95

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STIPULATION DISMISSING COUNTERCLAIM
WITHOUT PREJUDICE

WHEREAS, the answer of defendants to the complaint herein set forth a counterclaim contingent upon certain events; and

WHEREAS, on the cross-motions for summary judgment none of the parties, nor the Court in its decisions on the motions, addressed in any way defendants' contingent counterclaim; and

WHEREAS, all parties desire to proceed expeditiously toward the resolution of defendants' appeal of the recent judgment in favor of plaintiff on its affirmative claim, but said appeal cannot proceed without some procedural resolution of the unadjudicated contingent counterclaim,

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IT IS HEREBY AGREED AND STIPULATED by all parties in this action that, pursuant to F.R.Civ.P. 41(a)(1) and (c), defendants' contingent counterclaim is dismissed without any prejudice to its refiling in the future in any context.

Dated: February 9, 1995


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Retirement Fund and The
Bank of New York

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB 9 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
GLENDA WILEY aka GLENDA ANN)
WILEY; COUNTY TREASURER, Tulsa)
County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE FEB 10 1995

Civil Case No. 94-C 988E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 9 day of Feb,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; and the Defendant, **Glenda Wiley aka Glenda Ann Wiley**, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, **Glenda Wiley aka Glenda Ann Wiley** will hereinafter be referred to as ("Glenda Wiley").

The Court being fully advised and having examined the court file finds that the Defendant, **Glenda Wiley**, acknowledged receipt of Summons and Complaint via certified mail on November 28, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on November 1, 1994; and that the Defendant, **Glenda Wiley**, has failed to answer and her default has therefore been entered by the Clerk of this Court.

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot Three (3), Block One (1), SHANNON PARK SIXTH,
an Addition in Tulsa County, City of Tulsa, State of
Oklahoma, according to the recorded Plat No. 3209.**

The Court further finds that on December 22, 1988, the Defendant, Glenda Wiley, executed and delivered to SEARS MORTGAGE CORPORATION her mortgage note in the amount of \$40,222.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Glenda Wiley, executed and delivered to SEARS MORTGAGE CORPORATION a mortgage dated December 22, 1988, covering the above-described property. Said mortgage was recorded on December 28, 1988, in Book 5148, Page 220, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 30, 1989, SEARS MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to Southeast Mortgage Company. This Assignment of Mortgage was recorded on October 20, 1989 in Book 5214, Page 2441, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 30, 1990, SOUTHEAST MORTGAGE COMPANY assigned the above-described mortgage note and mortgage to the U.S. Department of Housing and Urban Development, his successors and assigns. This

Assignment of Mortgage was recorded on June 15, 1990, in Book 5259, Page 1018, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 2, 1990, the Defendant, Glenda Wiley, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on April 23, 1991.

The Court further finds that on September 22, 1992, the defendant, Glenda Wiley, filed her petition for Chapter 7 relief in the United States Bankruptcy Court for the Northern District of Oklahoma, Case # 92-03316-W; and was discharged on January 26, 1993, and the case was closed on May 4, 1993.

The Court further finds that the Defendant, Glenda Wiley, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Glenda Wiley**, is indebted to the Plaintiff in the principal sum of \$58,025.31, plus interest at the rate of 10 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, **County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma**, claim no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Glenda Wiley**, is in default, and has no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, **Glenda Wiley**, in the principal sum of \$58,025.31, plus interest at the rate of 10 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of _____ percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Glenda Wiley, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Glenda Wiley**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

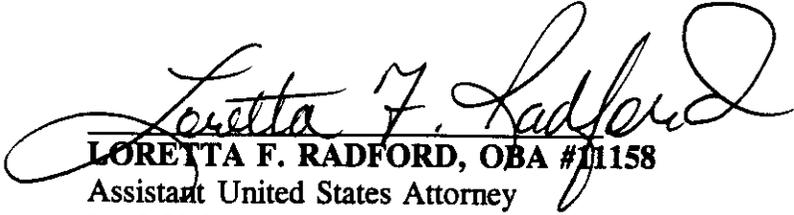
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with a large, looping initial "L".

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3900 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

Judgment of Foreclosure
Civil Action No. 94-C 988E

LFR:lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB 9 1995

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Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BARBARA E. COOPER,)
)
 Plaintiff,)
)
 vs.)
)
 DONNA E. SHALALA, SECRETARY OF)
 HEALTH AND HUMAN SERVICES,)
)
 Defendant.)

Case No. 93-C-586-E ✓

ENTERED ON DOCKET

DATE FEB 10 1995

O R D E R

Now before the Court is the appeal of Plaintiff Barbara Cooper ("Cooper") of the Secretary's denial of her application for Supplemental Security Income Benefits. Plaintiff alleges she became disabled on April 1, 1986, as the result of the onset of mental illness. Upon denial of benefits, Cooper requested a hearing before an Administrative Law Judge ("ALJ"), which was held November 20, 1991. The ALJ denied Cooper's claim. Cooper's request for review by the Appeals Council resulted in the ALJ's decision being upheld. Cooper filed an action in this Court on June 24, 1993, and a hearing was held on February 2, 1995.

The issues presented on appeal are: whether Cooper's mental disability automatically entitles her to disability benefits under § 12.03 or § 12.04 of the Appendix I listing of impairments; whether the ALJ improperly considered the opinion of Cooper's treating physician in his evaluation of Cooper's disability claim; and, whether Cooper is entitled to disability benefits because of the testimony of a vocational expert.

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Legal Analysis

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. § 416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. § 416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. § 416.920(b)
2. A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. § 416.920(c).
3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).
4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).
5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. § 416.920(f).

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable

mind would accept as adequate to support a conclusion Andrade v. Sec'y of Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams, 844 F.2d at 750 (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't of Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams, 844 F.2d at 750.

The evidence in this case is that Cooper was hospitalized once in 1986, once in 1989, and once in 1990. Each hospitalization was in response to Cooper's suffering of delusions, paranoia, and being in a generally disorganized condition. At the second hospitalization, Cooper was administered medication (Navane and Lithium) by her treating physician, Dr. Fermo. The medication was effective, and enabled Cooper to return home in less than a week. Plaintiff's hospitalization in 1990 was similar: symptoms of mental illness dissipated when Cooper received regular medication.

Plaintiff contends that the ALJ incorrectly assessed her functional limitations. Had the ALJ made an accurate assessment, alleges Plaintiff, the ALJ would have found that her impairments

fall under listing § 12.03 and/or § 12.04.

To meet the specific requirements for disability under § 12.03, Plaintiff must show that her mental impairment results in at least two of the following: (1) marked restrictions on daily living; (2) marked difficulties in maintaining social functioning; (3) deficiencies of concentration resulting in frequent failure to complete tasks in a timely manner; or (4) repeated episodes of deterioration or decompensation in a work/work-like setting causing the claimant to withdraw from the situation or experience an exacerbation of symptoms. 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.03(B) (1993). Section 12.04(B) lists the same four requirements.

Plaintiff further asserts that the ALJ improperly considered the opinion of Cooper's treating physician in his overall evaluation of Cooper's disability benefits claim. In a letter to Plaintiff's attorney on October 10, 1991, Dr. Fermo wrote, "[i]t is my opinion that Barbara is totally disabled and will not be able to work." Tr. 277. In another letter to Plaintiff's attorney, on July 23, 1992, Dr. Fermo wrote, "[b]ecause of her mental and physical health, it is my opinion that Barbara is totally disabled and will not be able to work." Tr. 13.

The ALJ found Dr. Fermo's conclusions to be unsupported by Fermo's own clinical notes, by the claimant's medical record, and by her own admissions concerning her regular daily activities. Tr. 35. The ALJ's finding is supported by substantial evidence in the record. Dr. Fermo's clinical notes describe a patient whose mental

illness is controlled by medication. Claimant's medical record details her efforts to control her mental illness, as well as documenting the treatment she has received for problems with her feet and bowel. The ALJ described Cooper's medical record in the course of performing step two of his 20 C.F.R. § 416.920(a) sequential analysis:

The medical evidence is convincing that the claimant has a history of episodes of psychotic disorders, specifically auditory hallucinations, insomnia, manic-depression, and decreased energy. The claimant therefore has a 'severe impairment' within the meaning of the Social Security Act.

Tr. 9.

Cooper's severe impairment has not precluded her from participating in the routine activities of a homemaker. Claimant's own admissions concerning her regular daily activities include car pooling her children to and from school, attending to personal needs, doing laundry and dishes, preparing dinner for her family (with assistance), reading, shopping, and attending church. Tr. at 32, 57, 228.

Dr. Ronald Passmore examined Cooper in December, 1990, at the Secretary's request. Passmore found no symptoms of mental illness at the examination. Tr. 228. From Cooper's information, Passmore concluded that Cooper suffered from manic depressive illness, with possible schizophrenia, but that the condition was controlled by medication and her adjustment was fair. Id.

Based on the evidence of record, the ALJ determined that Cooper's mental illness was controllable with medication, and as a

result, the illness did not effect a marked restriction of activities of daily living. Thus, the ALJ found that Cooper's impairments did not automatically qualify her for benefits under either § 12.03 or § 12.04, discussed *supra*.

Plaintiff states the general rule that a treating physician's opinion should be given substantial weight. Reyes, 845 F.2d at 244. It must be noted that the rule has an exception if there is "good cause" for rejecting the opinion of the treating physician. Id., at 245. "Good cause" includes an opinion that is brief, conclusory, and/or unsupported by the medical evidence of record. Bernal, 851 F.2d at 301.

Here, the ALJ rejected the opinion of Dr. Fermo. The ALJ concluded that Fermo's finding of total disability was unsupported by the evidence of record. Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988). The ALJ weighed the evidence before him against Fermo's conclusory statements that Cooper suffered total disability. The ALJ noted that Fermo's brief statements were unsupported by "progress notes or definitive information." Tr. 35. The two letters in which Fermo declared Cooper to be totally disabled did not cite substantive evidence of total disability, but were merely partial recitations of symptoms described to Dr. Fermo by Plaintiff.

Plaintiff places considerable emphasis on the vocational expert's statement that Cooper's disabilities "would essentially eliminate a person's ability to sustain employment." Tr. 87. The expert's testimony was predicated on the following question from

the ALJ: "[i]f we go ahead and accept all the testimony as it has been given, how would that impact existing jobs?" Id. The ALJ was clearly surprised by the nature of the expert's response, which postulated that no employment would be available:

- Q. (Cutting off expert) Okay, now you have gotten outside of my hypothetical question.
- A. Oh, excuse me, Your Honor.
- Q. I didn't put anything in there about going in, staying inside.
- A. I thought you said on the testimony --
- Q. I am sorry, I am sorry, I did, I changed the question there. I apologize for that, I sure did. Staying inside, okay. Alright, I sure did. This being inside would be a severe problem, you are right, alright.

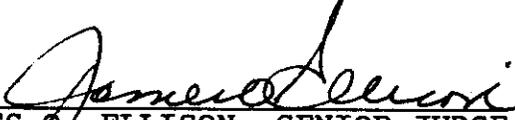
Tr. 87-88.

Because the expert's opinion that Plaintiff is unemployable was not within the scope of the ALJ's hypothetical, it does not reflect the vocational implications of the ALJ's determination of the scope of Cooper's disability. Earlier hypotheticals posed by the ALJ, however, accurately reflected the extent of disability that Cooper suffered, as perceived by the ALJ. Tr. 85-87. The ultimate determination of disability is the province of the ALJ. 20 C.F.R. § 416.927(e)(1) (1993). The restrictions imposed by the ALJ in his hypothetical questions to the expert were inclusive of the impairments and restrictions found by the ALJ based on his review of the entire record. Gay v. Sullivan, 986 F.2d 1336, 1340-41 (10th Cir. 1993).

The Court therefore finds that the ALJ's conclusion that Plaintiff was not disabled is supported by substantial evidence in

the record. The decision of the Secretary to deny benefits is affirmed.

IT IS SO ORDERED THIS 9th DAY OF FEBRUARY, 1995.



JAMES D. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB 9 1995 *LC*

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DONALD L. ROBERTS,)
)
 Plaintiff,)
)
 vs.)
)
 DONNA SHALALA, SECRETARY OF HEALTH)
 AND HUMAN SERVICES,)
)
 Defendant.)

No. 92-C-1187-E ✓

ENTERED ON DOCKET
DATE FEB 10 1995

O R D E R

Now before the Court is the appeal of the plaintiff Donald L. Roberts (Roberts) to the Secretary's denial of disability benefits.

Roberts filed an application for disability benefits on May 8, 1989. Roberts' application resulted in a favorable determination by an Administrative Law Judge on October 26, 1991. Subsequently, the Appeals Council reopened Plaintiff's application because of a question regarding Plaintiff's age. The case was remanded, and a new hearing ordered to fully develop the claimant's work activity, give further consideration to claimant's ability to perform substantial gainful activity and the onset date of disability, if any. In May, 1992, the ALJ on remand found that the claimant was not disabled because he could perform his past relevant work as a night watchman.

Roberts, who was 57 at the time of the second hearing, claims to be disabled because of a disabling back injury with muscle spasm, emphysema, high blood pressure, headaches with nosebleeds,

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dizziness and blackouts. Claimant testified to a lengthy history of back pain, and that he has not worked since he left his job as a night watchman in 1989 because of a back injury from a slip and fall accident. He testified that he had pain and stiffness at all times, but certain movements cause it to worsen; that he could walk 2 to 3 blocks on level ground; that he could not lift anything heavier than 30 pounds for more than 5 to 10 minutes and could not sit in one place more than 10 to 15 minutes because of back spasms.

Dr. Sutton examined Claimant on February 4, 1992, and then noted that while he had difficulty moving, and needed to hold onto things for support, once he reached the parking lot, Dr. Sutton observed him to walk "at an entirely normal gait and speed." Dr. Sutton also noted that he drove, could close his van door, and use his left arm to turn the steering wheel. Dr. Sutton was of the opinion that the claimant does have some disability by x-ray substantiated arthritis in his back, kyphosis, hypertension and COPD. Dr. Sutton believed, however, that Claimant should be able to stand or walk four hours in an eight hour day, one hour without interruption, and sit for a total of four, one hour without interruption.

The Administrative Law Judge asked the vocational expert a hypothetical regarding a person who was 56 years of age; had a fifth grade education with a marginal ability to read, write and use numbers; had the ability to stand or walk four hours in an eight hour day, one hour without interruption, and the ability to sit four hours in an eight hour day, one hour without interruption; would need to shift positions for comfort; could lift 50 pounds on

an occasional basis and 35 pounds on a frequent basis; and could occasionally climb, stoop, kneel balance crouch, and crawl. The ALJ also asked the expert to take into account that there would be environmental restrictions regarding temperature extremes, chemicals, dust and fumes, and that the individual had mild to moderate pain. On these facts, the expert was of the opinion that claimant could return to his job as a night watchman. The ALJ then found that Claimant was capable of medium exertional activity and therefore could perform his past work as a night watchman and was not disabled.

The only issue on appeal centers around the ALJ's reliance on the report of Dr. Sutton in framing his hypothetical question, and whether Dr. Sutton's report supports the opinion of the vocational expert.

Legal Analysis

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)
2. A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).
3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).
4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).
5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that

the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes V. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, *i.e.*, the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was

applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

In this case, the ALJ ended his inquiry at step four of the sequential evaluation, finding that Plaintiff did possess the residual functional capacity to return to his past work as a night watchman. Claimant contends that the ALJ erred in reaching this conclusion because Dr. Sutton's testimony does not support a finding that claimant can return to light exertional activity. Claimant specifically concedes that the ALJ did include all of his limitations in the hypothetical to the vocational expert, but argues that the expert erroneously testified that he was capable of performing medium exertional work because medium work, by definition requires the ability to stand or walk 6 hours out of an 8 hour day, and Dr. Sutton felt that the claimant could stand or walk only 4 hours out of an 8 hour day. The Claimant also argues that the evidence does not support the finding that he could return to his job as a night watchman, because he had testified that his job as a night watchman required standing or walking eight hours.

In response, the Secretary notes that, at the fourth step, the burden is on the claimant to prove that he is disabled. Further, the Secretary argues that the Claimant is ignoring the vocational expert's testimony that the job of a night watchman could be performed by someone who could only stand or walk 4 hours in an 8-hour day, and that Plaintiff could therefore perform that job. Relying on Social Security Ruling 82-61, she argues that the possible tests for determining whether or not a claimant retains

the capacity to perform his or her past relevant work are whether the claimant retains the capacity to perform the job duties of a particular past relevant job or the job duties of the occupation as generally required by employers throughout the national economy. Since Claimant's testimony is undisputed that his job as a night watchman required him to be on his feet for eight hours at a time, the Secretary argues that the vocational expert presumably found that the claimant could perform the functional demands and job duties of the occupation as generally required by employers throughout the national economy.

The Court finds however, there is no evidence in the record to support that presumption. Further there is no evidence in the record that the functional demands and job duties of the occupation of night watchman as generally required by employers throughout the national economy require only the ability to stand or walk only 4 hours out of an 8 hour day, one hour without interruption. Thus, regardless of the burden of proof issue, the court finds that the ALJ's determination is not supported by substantial evidence. The case is remanded for further development of the testimony of the vocational expert to determine the functional demands and job duties of a night watchman as generally required throughout the national economy.

 2/9/1995
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB 9 1995



Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DALE WAYNE WILLIAMS,

Plaintiff,

vs.

STANLEY GLANZ,

Defendant.

No. 93-C-1074-E

ENTERED ON DOCKET

FEB 10 1995

DATE _____

ORDER

In this prisoner's civil rights action, Plaintiff, pro se and in forma pauperis, sues Tulsa County Sheriff Stanley Glanz for the December 11, 1991 beating of Plaintiff at the hands of fellow inmates while he was a pretrial detainee at the Tulsa County Jail. He alleges that a Tulsa County jailer disregarded his plea for protective custody and placed him in a very violent tank on the eighth floor of the Tulsa County Jail although it was known that previous inmates had been assaulted in that tank by the same gang members. Plaintiff seeks compensatory damages.

Sheriff Glanz has moved to dismiss or for summary judgment. He alleges that Plaintiff's allegations fail to state a cause of action against Defendant Glanz, that assault and battery do not state a claim under section 1983, and that Plaintiff's reliance on the Eighth Amendment is misplaced. In the court-ordered Martinez Report, the Tulsa County Jail reviews the Sheriff's Office procedure with regard to catwalk inspections and sight checks, but does not address when Plaintiff was transferred from the City to Cell D28 in the Tulsa County Jail; the previous beatings in that cell; and whether Plaintiff requested protective custody prior to

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the transfer.

The Plaintiff has objected to Defendants' motion and has requested leave to amend the complaint. (Doc. #24.) For the reasons stated below, the Court concludes that Defendants' motion to dismiss should be denied in part and granted in part, and that Plaintiff should be granted an opportunity to amend his complaint as more fully stated below.

I. ANALYSIS

Because Plaintiff was a pretrial detainee during the events at issue, he is not entitled to relief under the Eighth Amendment. The Fourteenth Amendment Due Process Clause, not the Eighth Amendment's protections against cruel and unusual punishment, protects a pretrial detainee such as the Plaintiff. See Bell v. Wolfish, 441 U.S. 520 (1979); Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977); see also Berry v. City of Muskogee, 900 F.2d 1489, 1493-94 (10th Cir. 1990); Goka v. Bobbitt, 862 F.2d 646, 649-50 n.2 (7th Cir. 1988); Anderson v. Gutschenritter, 836 F.2d 346, 348-49 (7th Cir. 1988). Therefore, Plaintiff can show no set of facts entitling him to relief under the Eighth Amendment and that claim must accordingly be dismissed. The Court, however, will liberally consider Plaintiff's claims under the Fourteenth Amendment in accordance with his pro se status.

Failure to protect arises only if prison officials knew or should have known of a substantial foreseeable risk of danger to the Plaintiff. Berg v. Kincheloe, 794 F.2d 457, 459 (9th Cir.

1986); Richardson v. Penfold, 839 F.2d 392, 395 (7th Cir. 1988). Neither negligence nor gross negligence is enough; the prison official's conduct must rise to a level of infliction of punishment on the inmate. Duckworth v. Franzen, 780 F.2d 645, 652-53 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986).

In light of Plaintiff's pro se status, and in light of Fed. R. Civ. P. 15(a)'s requirements that leave to amend be "freely given," the Court denies Defendants' motion to dismiss or for summary judgment as to Sheriff Glanz and grants Plaintiff an opportunity to amend his complaint. A plaintiff may state a claim against a particular supervisory official for an inmate attack occurring in an atmosphere of pervasive risk if the plaintiff alleges that the Defendant knew or should have been aware of the risk and failed to respond by instituting procedures designed to remedy the situation. Matzer v. Herr, 748 F.2d 1142, 1149 (7th Cir. 1984), abrogated on other grounds by Salazar v. City of Chicago, 940 F.2d 233 (7th Cir. 1991); see also Berry, 900 F.2d at 1498; Gibson v. Babcox, 601 F. Supp. 1156, 1161 (N.D. Ill. 1984). Although Plaintiff only alleged a pervasive risk of harm in his complaint, Plaintiff's response indicates that he intended to sue Sheriff Glanz as the final policy maker with specific duties to care for inmates and supervise employees.

"A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). This broad reading of a pro se plaintiff's complaint does

not, however, relieve him of the burden of alleging sufficient facts on which a cognizable claim could be based. Id. Even so, a pro se plaintiff who fails to allege sufficient facts is to be given a reasonable opportunity to amend his complaint if justice so requires. See Roman Nose v. New Mexico Dept. of Human Services, 967 F.2d 435, 438 (10th Cir. 1992). Accordingly, the Court will deny Defendants' motion to dismiss or for summary judgment without prejudice as to Stanley Glanz and grant Plaintiff twenty days within which to submit a motion for leave to amend and a proposed amended complaint. Plaintiff's proposed amended complaint shall be on the civil-rights-complaint form and shall be complete in itself including exhibits, if any, without reference to the superseded complaint. Local Rule 9.3.C.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motion to dismiss or for summary judgment (doc. #14) is **granted** as to Plaintiff's eighth amendment claim and **denied without prejudice** in all other respects;
- (2) Plaintiff shall have twenty (20) days from the date of entry of this order within which to submit a **motion for leave to amend** under Fed. R. Civ. P. 15(a) and a **proposed amended** complaint alleging a claim against Sheriff Glanz as outlined in this order; and
- (3) The Clerk shall **mail** to the Plaintiff two blank civil-

rights-complaint forms labeled "Amended Complaint."

SO ORDERED THIS 9th day of February, 1995.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB 8 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ANTHONY STEELE,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION, et al.,)
)
 Respondents.)

No. 92-C-976-C ✓

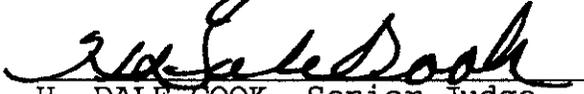
DATE 2-9-95

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed in part and reversed in part with instructions to dismiss Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 8th day of February, 1995.


H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE ~~FEB 09 1996~~ FEB 09 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

WILLIAMS PIPE LINE COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 EMPIRE GAS CORPORATION,)
)
 Defendant.)

No. 94-C-83-K

FEB 9 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

Before the Court is the motion of the defendant for summary judgment or, in the alternative, for stay pending primary jurisdiction of the Federal Energy Regulatory Commission and the motion of the plaintiff for partial summary judgment. The following statement of facts is taken from the parties' proposed Pre-Trial Order. In 1989, Donna Pipes and Mae Cook were injured when propane gas exploded in their residence. The propane had been transported by plaintiff Williams Pipe Line Company ("WPL") on behalf of defendant Empire Gas Corporation ("Empire"), pursuant to WPL's tariff on file with the Federal Energy Regulatory Commission ("FERC"). The propane had been delivered to Empire at WPL's terminal at Carthage, Missouri, where it was odorized with ethyl mercaptan at a rate in excess of 1.5 pounds per 10,000 gallons of propane. The propane was delivered to the Pipes/Cook residence by Empire.

Ms. Pipes sued in Missouri state court for her injuries sustained as a result of the explosion, and Ms. Cook threatened suit. In the lawsuit, Ms. Pipes named both Empire and WPL as

defendants. WPL demanded that Empire defend WPL in the Pipes litigation pursuant to the indemnity provision in WPL's FERC tariff. Empire refused that demand. WPL settled the claims asserted against it by Ms. Pipes and Ms. Cook for \$375,000. WPL brought the present actions to recover the amount of the settlement and the cost of defending itself in the Pipes litigation. Empire denies all liability under the indemnity provision.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

The pending motions do not raise factual issues, but rather ask the Court to interpret the indemnity provision contained within WPL's transportation tariff.¹ The relevant language is as follows:

¹In this context, a tariff is a public document setting forth the services of the carrier being offered, the rates and charges with respect to the services and the governing rules, regulations and practices relating to those services. Int'l Tel. & Tel. Corp. v. United Tel. Co., 433 F.Supp. 352, 357 n.4 (M.D.Fla.1975), aff'd, 550 F.2d 287 (5th Cir.1977).

Consignor and consignee agree jointly and severally to indemnify, hold harmless and defend carrier from and against any and all claims and liabilities based on or arising out of the selection or use of ethyl mercaptan or other odorant designated by consignor or consignee as an odorant of propane, including any claim against carrier for product liability, negligence, breach of warranty or other fault.

Defendant takes the position the indemnity provision is void and unenforceable as against federal law and public policy. In support of this view, defendant cites numerous FERC decisions which have invalidated tariff provisions purporting to indemnify a common carrier for its own negligence. See, e.g., Texas Eastern Transmission Corp., 57 FERC ¶ 61,368 (1991); Pacific Interstate Offshore Co., 62 FERC ¶ 61,260 (1993). See also United Gas Pipe Line Co. v. FERC, 824 F.2d 417, 427 (5th Cir.1987) ("[I]t is not in the public interest to exculpate a pipeline from its own negligence or willful misconduct").

In response, WPL dismisses Empire's argument as hypothetical, because it presumes negligence on WPL's part regarding the Pipes explosion. Instead, WPL insists, "the sole issue before the Court is the much narrower question of whether the indemnity provision properly requires Empire to hold WPL harmless for claims asserted against WPL based on conduct which is wholly within Empire's control." (Plaintiff's Response Brief #20 at 1). WPL points out the indemnity provision also leaves the ultimate decision on odorant to the shipper and designates ethyl mercaptan as the odorant used in the event the shipper fails to designate another. Also, WPL notes Empire's response to a discovery request in which

Empire stated it did not contend WPL was actually negligent in its conduct or that the propane involved in the accident was defective or breached any warranty. Within the same discovery response, Empire also said it viewed the issue of WPL's actual negligence as irrelevant because "the relevant issue is whether Williams Pipe Line Company settled any claims against it which alleged negligence." Based on these materials, WPL urges the conclusion "whatever the result might be in a case where WPL was actually negligent, in a case like this one where there is no proof that WPL was negligent, the tariff clearly requires shippers like Empire to indemnify and defend WPL." (Id. at 4).

The allegations in the Pipes litigation were made against both WPL and Empire and sounded in negligence, breach of implied warranty, and products liability. (Pleading #16, Exhibit 1: Donna Pipes' First Amended Petition for Damages). WPL odorized the propane. The indemnity provision at issue states the carrier [WPL] shall be held harmless and indemnified from any claim against carrier for product liability, negligence, breach of warranty or other fault. The issue before this Court is interpretation of language, not evidentiary proof of fault. A party's negligence vel non is determined by trial in a courtroom; settlement renders moot any such inquiry. The Pipes petition asserted claims of liability against carrier and WPL settled those claims on its own behalf. As such, WPL now seeks indemnification for its own alleged negligence. The tariff as written falls within that group which FERC has disapproved. To adopt WPL's position would grant carriers carte

blanche to settle claims made against them, while denying liability, and then seek indemnification for any sums paid. The Court does not accede to such potential consequences.²

WPL also argues a form of estoppel, asserting Empire should have objected to the tariff at issue here when it was initially filed, more than eight years ago. No authority is cited for this proposition, and the Court rejects it. As Empire notes, no time limit appears in 18 C.F.R. §385.206, which permits a party to seek FERC action over matters of this type. Also, because FERC has already announced its view of this type of indemnity provision in a tariff, the doctrine of primary jurisdiction is not implicated. See Fontan-De-Maldonado v. Lineas Aereas Costarricenses, 936 F.2d 630, 631 (1st Cir.1991).

In the case at bar, WPL also sets forth state claims for common law indemnity and restitution. Empire alleges these claims are barred by virtue of Section 537.060 of the Missouri Statutes, which provides as follows:

Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgments, in the same manner and to the same extent as defendants in a judgment in an action founded on contract. When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith to one of two or more persons liable in tort for the same injury or wrongful death, such agreement shall not discharge any of the other tortfeasors for the damage unless

²As Empire notes, the potential also exists for the tariff as written to be applied in a discriminatory manner, seeking indemnity from one shipper and not another. Failure to apply tariff provisions in a uniform manner may violate 49 U.S.C. §10741(a).

the terms of the agreement so provide; however such agreement shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater. The agreement shall discharge the tortfeasor to whom it is given from all liability for contribution or noncontractual indemnity to any other tortfeasor. The term "noncontractual indemnity" as used in this section refers to indemnity between joint tortfeasors culpably negligent, having no legal relationship to each other and does not include indemnity which comes about by reason of contract, or by reason of vicarious liability.

Empire asserts the settlement under Missouri law which it entered in the Pipes litigation bars the noncontractual indemnity claims of WPL in this case. In response, WPL first asserts waiver because Empire did not mention the Missouri statute as an affirmative defense in its answer. The Court finds the statutory defense was timely raised in the pending motion for summary judgment, and WPL is not prejudiced thereby. The defense will be allowed. See Richmond Steel, Inc. v. Legal & General Assurance Soc'y, Ltd., 821 F.Supp.793, 797 (D.P.R.1993). Finally, WPL protests it has not seen the settlement agreement entered into between the plaintiff in Pipes and Empire. However, WPL has not disputed Fact no.22 set forth in Empire's initial brief which states: "Subsequently, in August 1993, Empire and Empiregas, Inc. of Monett also settled the claims by Donna Pipes and Mae Cook against them pursuant to Section 537.060 R.S.Mo." (emphasis added). The Court has also reviewed the settlement agreement in camera and finds it expressly states the agreement "is entered into in the State of Missouri and shall be construed and interpreted in accordance with its laws." Sufficient

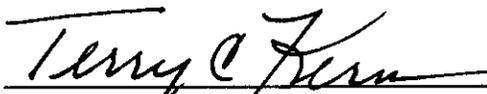
factual basis exists for summary judgment.

Plaintiff has also filed a motion to strike defendant's reply brief, or in the alternative for leave to file additional briefing pages. The additional briefing pages were filed, addressing the arguments about which plaintiff expressed concern in the motion to strike. Accordingly, the motion shall be denied.

It is the Order of the Court that the motion of the defendant Empire Gas Corporation for summary judgment (#14) is hereby GRANTED.

It is the further Order of the Court that the motion of the plaintiff Williams Pipe Line Company for partial summary judgment (#25) and the motion of the plaintiff to strike (#29) are hereby DENIED.

ORDERED this 7 day of February, 1995.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
FEB 09 1995
DATE _____

DOROTHY JO McCRARY,

Plaintiff,

vs.

DONNA SHALALA, in her capacity as
SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 93-C-616-K ✓

F I L E D

FEB 8 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

On January 3, 1995, this Court issued an Order granting summary judgment to the Defendant on most of the claims by Plaintiff Dorothy Jo McCrary in her suit seeking recovery for alleged discrimination, sexual harassment, and retaliatory action, all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and the Civil Rights Act of 1991. However, the Court held in abeyance a summary judgment ruling with respect to claims made by McCrary relating to her failure to be interviewed for a supervisor's position.

Defendant asserts that it is entitled to summary judgment pursuant to Fed.R.Civ.P. 56 on the decision by IHS not to interview Plaintiff for the Supervisory Management Analyst Position under vacancy announcement No. OC-89-69. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which

would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

In order to defeat the summary judgment motion, Plaintiff pointed to a comment made by Franklin Dreadfulwater, Associate Director of the Oklahoma City Area IHS, about Plaintiff. See Response to Defendant's Motion for Summary Judgment. According to a co-worker of Plaintiff, Dreadfulwater stated in response to a comment by the co-worker about Plaintiff's EEO complaints, "Don't worry about that. There is ways of getting rid of people like that." Pl.'s Resp., Ex. B., Statement of Bernice Willsey. This Court held in abeyance a ruling on this aspect of the Motion for Summary Judgment because it was unclear whether Plaintiff was alleging that Mr. Dreadfulwater played a role in the decision not to interview the Plaintiff for the supervisor's position. Certainly, Plaintiff had failed in her Response to articulate a clear allegation to that effect.

However, the Court granted Plaintiff 30 days to make a showing that these remarks reflected some connection between protected opposition to alleged discrimination and the employer's decision not to interview her for the supervisor's position. The Plaintiff has added nothing to the Record. Therefore, the Court is left only

with the remark attributed to Franklin Dreadfulwater in Plaintiff's original Response. Moreover, the government has submitted an affidavit by Leonard Thompson, the administrative officer charged with filling the relevant position. The affidavit states that "Mr. Dreadfulwater was in no way involved in such decision, nor did he in any way influence my decision in this matter." Def.'s Supp. Mem. of Law (Exh. K).

Case law has consistently held that remarks unrelated to the decision making process are insufficient to establish discriminatory intent. In Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), Justice O'Connor examined this issue in her concurring opinion. She stated:

Stray remarks in the work place . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by non-decision makers or statements by decision makers unrelated to the decisional process itself suffice to satisfy the plaintiff's burden in this regard.

Id. at 277. Plaintiff has failed to establish that the remark by Mr. Dreadfulwater was anything but a stray remark.

Therefore, the Motion for Summary Judgment is granted with respect to Plaintiff's claim that she was unlawfully refused appropriate consideration for the supervisor's position.

IT IS SO ORDERED THIS 8 DAY OF February 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

JAMAL A. CURTIS,
546-19-9402

Defendant,

CIVIL NUMBER 94-C-699-B

FILED

ENTERED ON DOCKET

DATE FEB 09 1995

FEB 9 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

JUDGMENT BY DEFAULT

Upon application of the Plaintiff, the Court, having examined the records and files in this cause, and being fully advised in the premises, finds that service of process in manner and form provided by law was had upon the defendant, more than twenty days prior to this date.

And it further appearing to the court that the defendant has failed to appear, plead or answer, but has wholly made default, whereupon said defendant is adjudged in default.

And it further appearing to the court that the said plaintiff has filed an Affidavit pursuant to the Soldiers' and Sailors' Civil Relief act of 1940, as amended, and the court finds that the possibility of impairing any right thereunder of the defendant, is remote and that an order should be issued herein directing entry of judgment.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, United States of America, have and recover from the defendant, the sum of \$883.33 with interest at the rate of 7.03 % until paid, plus a surcharge of ten (10) percent of the amount of Plaintiff's claim in accordance with the provisions of 28 U.S.C. 3011, and the costs of this action accrued and accruing.

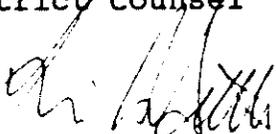
IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that this judgment be entered.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

CLIFTON R. BYRD
District Counsel



LISA A. SETTLE
Staff Attorney
Department of Veterans Affairs
Office of District Counsel
125 South Main Street
Muskogee, OK 74401
(918) 687-2191

ENTERED ON DOCKET
DATE FEB 09 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES PATRICK McCARTY,
Plaintiff,
vs.
TOM HOLLAND, DAVID EMBRY, JOHN
EVANS, ROBERT METZINGER, JAN
LINVILLE, and THE CITY OF
BARTLESVILLE, OKLAHOMA, a municipal
corporation,
Defendants.

Case No. 94-C-62-K ✓

FEB 9 1995
Richard M. L... Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

The Court notes that service has not been made on Defendants. On August 30, 1994, this Court issued an order, pursuant to Fed.R.Civ.P. 4(m), directing Plaintiff Charles Patrick McCarty to serve the Defendants within twenty days of the date of that Order. The Order stated that the case would be dismissed without prejudice if service was not made.

Pursuant to that Order and Fed.R.Civ.P 4(m), this case is dismissed without prejudice.

IT IS SO ORDERED THIS 8 DAY OF FEBRUARY, 1995.

Terry C. Kern
TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE FEB 09 1995

DOROTHY JO MCCRARY,
Plaintiff,

vs.

DONNA SHALALA, in her
capacity as SECRETARY OF
HEALTH AND HUMAN SERVICES

Defendant.

No. 93-C-616-K

FILED

FEB 8 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This matter came before the Court for consideration of the defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendant and against the plaintiff.

ORDERED this 8 day of February, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
FEB 09 1995
DATE _____

FEB 09 1995

MARTIN A. VAUGHAN,
an individual,

Plaintiff,

vs.

CHRIS EUGENE WILLIFORD,
an individual,

Defendant.

Case No. 94-C-126-K

FILED

FEB 7 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER ALLOWING MUTUAL DISMISSAL WITH PREJUDICE

Upon joint Motion to Dismiss With Prejudice the above-referenced matter in its entirety, the Court GRANTS said Joint Motion to Dismiss With Prejudice. The Court hereby ORDERS that the Complaint and Counterclaim filed herein are hereby dismissed with prejudice.

IT IS SO ORDERED this 7 day of February, 1995.

s/ TERRY C. KERIN

UNITED STATES DISTRICT COURT JUDGE

ENTERED ON DOCKET
DATE FEB 09 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALBERT R. DEAL,
Plaintiff,

vs.

DONNA E. SHALALA, SECRETARY
OF HEALTH AND HUMAN SERVICES,
Defendant.

No. 93-C-640-K

Richard M. Lohman, C. L. U.
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

Under 42 U.S.C. §405(g), plaintiff, Albert R. Deal, seeks review of the Secretary's denial of disability benefits for Supplementary Security Income under Sections 1602 and 1614(a)(3)(A) of the Social Security Act. Plaintiff contends the Secretary's finding that he could return to his past relevant work is not supported by substantial evidence as a matter of law.

I. BACKGROUND

A. PROCEDURAL HISTORY

According to Plaintiff's Brief, there have been two previous applications for Social Security benefits in which the administrative action is final. Mr. Deal filed an application on July 30, 1986, but did not pursue it past the initial determination of October 6, 1986. He refiled on January 5, 1988, but did not appear at the hearing. The Appeals Council remanded for another hearing based on the fact the Claimant did not timely receive

notice of the hearing. A hearing was held March 29, 1989, and a decision issued on July 24, 1989, holding Claimant was not disabled.

Simultaneously with this March 1989 hearing, Mr. Deal filed for Supplemental Security Income benefits, which application is the basis for this appeal. This March 29, 1989 SSI application was denied initially and upon reconsideration. Mr. Deal requested, and received, an administrative hearing on December 15, 1989. On January 24, 1990, the Administrative Law Judge ("ALJ") denied disability benefits. Upon request for review, the Appeals Council remanded the case for a supplemental hearing. Following the hearing on September 15, 1991, the ALJ again denied disability benefits. Mr. Deal requested a review by the Appeals Council, who subsequently remanded the case for another supplemental hearing. On February 18, 1993, the ALJ denied benefits following this 1993 supplemental hearing. This decision was upheld by the Appeals Council on May 20 1993, when it denied plaintiff's request for review. Thus, the ALJ's decision of February 18, 1993, became the final decision of the Secretary. Therefore, in determining whether plaintiff was eligible for benefits, the ALJ concerned himself only with evidence of plaintiff's condition after March 29, 1989. To obtain SSI benefits, plaintiff must show that he was currently disabled.

B. CLAIMANT TESTIMONY

Mr. Deal was born April 4, 1930 and has an early elementary

education¹. (Tr. 43-44, 71, 73, 93, 101, 127). Claimant cannot read or write, but can sign his name, tell time and make change "by telling the coins." (Tr. 44, 101). Plaintiff testified he is hard-of-hearing because of "shooting rifles" but medical history related he "was slapped across the left ear" at age 8, resulting in a hearing loss. (Tr. 284). Although he has a hearing aid, Claimant does not have the money to buy batteries. (Tr. 81, 114). Claimant also testified he has arthritis in his legs and back which causes pain, preventing him from working. (Tr. 46, 50, 59, 76, 78, 99, 135, 137, 149). Mr. Deal lives alone, is able to vacuum his apartment, and cooks for himself. His daughter, son-in-law or a neighbor will help him with other cleaning and shopping. (Tr. 54, 61, 78-80, 133-134). He spends the day watching TV in his recliner, walking a couple of blocks to "the Ministry" to visit 15-20 minutes or to use the phone, then returns home. Occasionally he attends church. (Tr. 133). Once a month he goes to the OCOMS Clinic to get free medication. (Tr. 50, 77, 138). In the past, Mr. Deal has taken Magan, Anaprax or Advil, all of which were effective in relieving his arthritis pain with no side effects. (Tr. 50, 99). Claimant's List of Medications, dated January 19, 1993, included Voltaren, 1 taken 3 times daily. (Tr. 514). Medical history revealed an accident involving a tractor in

¹Mr. Deal testified March 29, 1989, he finished the 4th grade and joined the Canadian Rangers at age 8 when his "dad signed for him." (Tr. 73-74). At the December 15, 1989 hearing, claimant testified he finished 6th grade. (Tr. 44). Then on September 6, 1991, Mr. Deal testified he attended the 6th grade but only completed the 3rd grade. (Tr. 93, 101). At the January 19, 1993, he testified he "went through the 4th grade." (Tr. 127).

approximately 1961 and a stab wound in approximately 1978, but no other hospitalizations. (Tr. 257-269).

Claimant last worked at a car wash approximately December 1987 for approximately 4-1/2 months. His responsibilities were to clean out the car, vacuum the inside and wipe the outside dry. Prior to the carwash job, Claimant found part-time work "mostly digging ditches," cleaning and "labor stuff." (Tr. 94, 146). Mr. Deal eventually found work at the Salvation Army for approximately a year and a half. His duties there were to help cook and serve meals to approximately 200-300, wash dishes and clean men's dorms. (Tr. 146). Claimant states he is unable to work because of back and leg pain. (Tr. 75, 94, 149, 343). The pain begins in the middle of his back, radiating to the bottom of his feet, and is "constant." (Tr. 105). Claimant can lift "10 pounds of potatoes," but not more than that amount "because it pulls on my back." (Tr. 139). Mr. Deal testified he could "probably stand a couple of hours," or walk "about three blocks," without resting. If he were sitting in a kitchen chair or one like that, Claimant testified he would be able to sit "about 15-20 minutes" because of the pain. (Tr. 45-47, 76, 78, 97, 100, 106-107, 137, 139). Claimant testified because of the pain he cannot bend but is able to squat if he keeps his back straight, and to climb if he holds onto something. (Tr. 51, 53, 61). Claimant has worn a brace and occasionally used a cane, but since March 1989 has used crutches "for about two hours." (Tr. 98-99, 57, 138). Claimant consistently indicated the pain was not severe as long as he was

taking his medication. (Tr. 51, 77, 99, 100, 103, 138, 149). His work history includes farming, heavy equipment operator, disk grinder, and construction foreman, none of which were within the last 15 years. Claimant's last date worked was January 31, 1988.

C. MEDICAL EVIDENCE

A consultative examination on September 18, 1986, by Dr. Cooper substantiated Claimant's complaints of paresthesia in both legs and pain primarily in the hip region. An occasional Tylenol, although sometimes six at a time, was taken for relief of pain. Dr. Cooper noted, "He adds to the history that his legs hurt most of the time, but his back doesn't bother him, his back is okay he says." The ranges of motion of the cervical spine, thoracolumbar spine, hips, knees, ankles, elbows, and shoulders were all within normal limits. Patrick-Fabere test on the left was positive as was Yeoman test on the right, both producing pain in the right sacroiliac junction region. There was pain on motion of Claimant's hips during the straight leg raising test with the knee straight. Although the range of motion of the hip in flexion, extension, adduction and abduction was essentially fully normal, Claimant experienced pain in the anterior and posterior thigh. Dr. Cooper concluded "[t]his gentleman probably suffers from osteoarthritis or degenerative joint disease in the hips, probably bilateral." Although none were taken, Dr. Cooper opined "that x-ray of these parts would probably make the diagnosis certain." (Tr. 270-272).

During the period October 2, 1986 through February 7, 1989,

Mr. Deal was treated at Oklahoma College of Osteopathic Medicine and Surgery ("OCOMS"). (Tr. 273-300). Claimant's chief complaint was arthritis in his legs and hips with pain radiating bilaterally to the knees and ankles. Claimant stated he had been taking Tylenol at home "up to 24 a day for the last month" with no relief. Dr. Denton's examination of Claimant on October 2, 1986, revealed positive straight leg raising test bilaterally, crepitus in the ankles and knees bilaterally, and positive Achilles grind test bilaterally. Both knees and ankles were moderately enlarged bilaterally. Although he walked with a "pronounced" limp, Mr. Deal had good muscle strength in all four extremities and sensory exam bilaterally was normal in both legs. Two views of the lumbar spine revealed "severe degenerative joint disease to the extent that there was no disc space appreciated in L-3, L-4 or L-5." Further, Dr. Denton instructed Claimant to limit his walking as much as possible. (Tr. 293-295). Subsequent lumbar x-rays taken December 17, 1987, revealed "minimal" degenerative changes at the L-4 and L-5 level, "and the anatomy is unchanged when compared to studies of 10/2/86." (Tr. 297). He was treated with Motrin 800 mg. until about May 1987 when the medication was changed to Naprosyn 500 mg. (Tr. 290). By July 1987, the arthritis medication was changed to Magan 545 mg., (Tr. 289), and notations during the month of October 1987 indicated arthritis in lower back "flaring-up" with weather changes. The medication was changed to Orudis. On December 17, 1987, the doctor noted Claimant "fell on ice Tuesday night going home from work." Orudis was continued and Claimant was "reminded

to wear the lumbar brace." (Tr. 282). Mr. Deal was checked again on January 4, 1988, and the doctor's notes indicated "marked muscle spasm" of the lumbar spine although Claimant had good range of motion. In February 1988, there was decreased range of motion in both knees and the medication was changed again to Naprosyn 500 mg. (Tr. 281). According to the doctor's notes on January 5, 1989, complaints of pain in the lower back, hips and knees with decreased range of motion were consistent with prior records; Anaprax was then prescribed. (Tr. 275). The last notation on February 7, 1989, indicated Mr. Deal's pain was improving with the medication and was to be rechecked in one month. (Tr. 274).

In April of 1989, Michael Karathanos, M.D., an internist consulting for the Social Security Administration, evaluated Mr. Deal. (Tr. 301-306). According to Mr. Deal his basic problem was severe arthritis of the low back and legs which have been present since 1969. Claimant described the pain as constant, being in the middle of his back, especially the low back area, radiating to both hips, down through both thighs, knees, calves to his feet. No particular movement or conditional situation was identified which might make it worse or better, but the medication was helpful in improving the pain. He also complained of tingling and numbness in the legs. Lower extremities strength evaluations indicated Mr. Deal had moderate difficulty with knee flexion and hip flexion and extension whereas strength in the upper extremities was well preserved. Lumbosacral spine examination showed decreased flexion and extension as well as significant pain on all motion. Even

though Dr. Karathanos reported Claimant walked in a "stooped and rather rigid manner and his gait was approximately 60-70% of normal strength, Mr. Deal's gait was stable and safe. The doctor referred to the 1986 and 1987 x-ray reports, but not having reviewed the x-rays, he opined Claimant had moderate to severe degenerative joint disease, "the exact extent of which however should be determined by a physician specializing in rheumatology." Apparently at the same time in April 1989, AP and lateral views of the lumbar spine and both hips were taken, which revealed minor osteoarthritic changes with small osteophytes. The alignment and disc spaces were well maintained, and no spondylolisthesis was present. There was no fracture, dislocation, bone destruction, or other bone or joint abnormality. Dr. Karathanos completed a Medical Assessment of Ability To Do Work-Related Activities (Physical) with the following indications: lifting/carrying 5 pounds frequently and 10 pounds occasionally; standing/walking 1-2 hours in 30 minute intervals during an 8-hour day; sitting no more than 2 hours at a time; no climbing or crouching; push/pulling is affected by the impairment; occasional (meaning from very little up to 1/3 of an 8-hour day) stooping, kneeling, balancing and crawling; environmental restrictions of moving machinery and temperature extremes, humidity and vibration.

Plaintiff resumed treatment at the OCOMS during April through October 1989. (Tr. 368-379). Mr. Deal continued to complain of back and leg pain with temporary relief by medication, although due to lack of money had been unable to secure a prescription and free

medicines had run out. (Tr. 368). In July 1989 three views of the lumbar spine revealed degenerative change with varying degrees in sites of hyperostosis, but negative for recent fracture or dislocation. (Tr. 379).

In conjunction with the remand of the Appeals Council, Mr. Deal was psychologically examined on April 4, 1991, by Minor Gordon, Ph.D., to specifically "assess an alleged chronic pain syndrome." (Tr. 383-388). On the Chronic Pain Battery, Dr. Gordon's cautious interpretation was of an individual whose problem with pain involves his upper and lower back of more than 10 years' duration. Dr. Gordon was impressed with Claimant's difficulty in reading and, consequently, the results of both the Chronic Pain Battery as well as the MMPI are of "very questionable validity." Medication is taken for pain control, but Claimant did not recall the name. Dr. Gordon's diagnosis "passive-dependent personality in a socially withdrawn individual" was prefaced with the notation, "the psychological testing data is not considered totally reliable." Simultaneously, Dr. Gordon completed the Medical Assessment of Ability to do Work-Related Activities (Mental) as follows: Fair ability to follow work rules, relate to co-workers, deal with public, use judgment in relating with the public, interact with supervisors, and deal with work stressors; good ability to function independently and to maintain attention and concentration; fair ability to understand, remember and carry out simple and/or detailed, but not complex, job instructions; fair ability to maintain personal appearance, behave in an emotionally

stable manner, relate predictably in social situations, and demonstrate reliability.

In June of 1991, E. Joseph Sutton, II, D.O., an internist, completed a consultative orthopedic evaluation of Mr. Deal. (Tr. 389-400). Dr. Sutton documented Claimant's medical complaints as arthritis in his back and legs with constant pain. Claimant represented to Dr. Sutton that he regularly walks about 2 blocks to the Osage Ministry to use the phone, cannot lift any significant weight because of disuse of his arms but could lift 10 pounds of sugar without difficulty, smokes a pack of cigarettes per day, uses no alcohol, and is taking Anaprox for his arthritis. Dr. Sutton's overall impression was leg weakness attributed to arthritis, COPD, and atherosclerotic vascular disease with right upper quadrant bruit. The doctor's assessment of Mr. Deal's ability to do work-related activities revealed Claimant could lift 10-15 pounds frequently, but would have difficulty with 15-25 pounds; standing/walking, impaired because of back and leg pain, no more than 1 hour walking without interruption with 2-4 hours total walking in an 8-hour day; sitting does not seem to be affected; ability to occasionally climb, stoop, kneel, crouch and crawl but difficulty trying to balance; no difficulty with reaching, handling, feeling, pushing, pulling, seeing, hearing or speaking; no difficulty with environmental restrictions; and no other impairments. AP and lateral views of the lumbar spine were compared to the examination dated April 24, 1989, and no appreciable interval changes were noted. There were mild

osteoarthritic changes with osteophyte formation, but the alignment and disc spaces were well maintained. There was no spondylolisthesis and the bones were of normal density. (Tr. 396).

Additional medical data from the Osteopathic Clinic for the period March 13, 1990 through September 29, 1992, further substantiated Mr. Deal's treatment for osteoarthritis and pain. (Tr. 408-433). Notations in early 1990 revealed Claimant was "losing strength in both legs," and had "pain constantly" in the middle back. On October 2, 1990, spinal x-rays revealed mild osteophyte formation throughout the lumbar spine, no fractures and normal intervertebral disk spacing. (Tr. 430). On January 15, 1991, the doctor indicated Mr. Deal had fallen on the stairs in his apartment and wanted a note from his physician so he could obtain a downstairs apartment. Claimant reported he had fallen on several occasions due to the arthritic stiffness in his legs. (Tr. 415). Arthritic treatment was continued with Anaprox, and Mr. Deal continued to be followed with essentially the same complaints through September 1991. Dr. Felmlee reported in January 1992 Mr. Deal had developed rash and itching with the change in medication to Tolectin. (Tr. 482). At this time the medication was changed to Triliste 750 mg., and then later to Voltaren 50 mg. In June of 1992, Claimant presented complaints of arthritis pain and, in addition, pain in his kidney area. From June to September, in addition to other unrelated symptomatology, Mr. Deal was followed for treatment of "hip, knee and ankle pain" with continuation of Voltaren 75 mg. (Tr. 467, 477).

An additional consultative orthopedic examination by J. D. McGovern, M.D., on November 9, 1992, related Claimant's complaints of low back pain which were present about 90% of the time, gradually becoming worse, and feelings of weakness and numbness in his legs. (Tr. 496-503). Dr. McGovern's examination revealed no objective abnormalities, no problem arising from a chair and getting on/off the examining table. There was no pertinent orthopedic or neurological finding. Claimant's motor function and heel-toe walk were normal, and no assistive device was necessary for a safe, stable gait. There was no nerve root compression detected. All ranges of motion were normal in spite of Claimant's complaints of pain. (Tr. 16, 496, 502). The following residual functional capacity evaluation was completed indicating the Claimant's physical ability to perform work-related activities on a sustained basis:

In an 8-hour work day: sit 1-2 hours at one time for a total of 8 hours; Patient can lift/carry 11-20 lbs. continuously, 21-25 lbs. infrequently, and nothing over 25 pounds. No limitation on use of both hands or feet for repetitive movements as in pushing and pulling controls. Claimant is able to infrequently bend, occasionally squat, climb and/or reach. No other environmental restriction.

(Tr. 500-501). Dr. McGovern did not evaluate Claimant's ability to stand or walk. Further, Dr. McGovern opined Mr. Deal's pain "was not consistent with my diagnosis of a L-5 strain suffered in 1969 car accident. There were no objective findings, and "in my opinion" did not contribute to Claimant's limitations "that seem to be self-imposed." (Tr. 502).

Finally, the ALJ secured testimony from a nonexamining medical expert, Dr. S.Y. Andelman, at the hearing conducted January 19,

1993. (Tr. 152-168). Dr. Andelman opined Claimant did not equal or meet any listing under 1.02, inflammatory arthritis; under 1.05, disorders of the spine; or under 3.00, respiratory system. The doctor pointed to several inconsistencies in his review of Claimant's relevant medical data, particularly, the length of time Claimant has had arthritis and the various doctors' opinions. (Tr. 153). X-rays from 1987 through 1992 showed varying degrees of degenerative changes, depending upon which doctor was reviewing or treating Claimant. However, examination of the upper extremities revealed no limitation of range of motion, and "most of these things [reports]," show no limitation of motion of the lower extremities. (Tr. 165). Claimant was given medication to decrease the pain, which was adequate, and he never received any physical therapy. (168). Dr. Andelman determined Claimant (1) could sit for a couple of hours in sedentary work, get up and move around to relieve the pain, then return to sitting again; (2) could lift 20 or 30 pounds "possibly," although based on lack of activity, exercise and strengthening, it would be possible that Claimant could not lift anything. (Tr. 159-160).

II. LEGAL ANALYSIS

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)
2. A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).
3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).
4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).
5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The Claimant bears the burden of establishing a disability, *i.e.*, the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that Claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

In this case, the first three steps are not at issue. Rather, plaintiff argues that the ALJ erred at Step 4 of the sequential evaluation process in the assessment of plaintiff's residual functional capacity, specifically, (a) in failing to include the limiting effects of Mr. Deal's postural impairments, (b) in failing to properly compare Mr. Deal's individual residual functional capacity with the demands of his former work, and (c) in failing to

make specific findings of the physical demands of his past relevant work. While the Claimant's impairments were severe, the ALJ found Mr. Deal did not have an impairment, or combination of impairments, listed in, or medically equal to, "the Listings," Appendix 1, Subpart P, Regulations No. 4. The ALJ concluded as follows:

1. The Claimant has not engaged in substantial gainful activity since January 31, 1988.
2. The medical evidence establishes that the Claimant has severe chronic back complaint, but that does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.
3. The subjective allegations of disabling pain are not considered credible.
4. The Claimant has the residual functional capacity to perform work-related activities except for work involving lifting more than 20 pounds occasionally or 10 pounds frequently (20 CFR 416.945).
5. The Claimant's past relevant work as a janitor and carwash attendant did not require the performance of the work-related activities precluded by the above limitations (20 CFR 416.965).
6. The Claimant's impairment does not prevent the Claimant from performing his past relevant work.
7. The Claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of the decision (20 CFR 416.920(e))

(Tr. 18). Thus, the ALJ concluded the Claimant was not eligible for Supplemental Security Income under Sections 1602 and 1614(a)(3)(A) of the Social Security Act.

According to Section 416.945 of the Social Security Act, when an individual has a severe impairment or impairments, but the symptoms, signs and laboratory findings do not meet or equal those

of a listed impairment, the Secretary "must consider the limiting effects of all impairments, even those that are not severe, in determining a Claimant's residual functional capacity. Even though the ALJ agreed Claimant's impairments limited his ability to lift more than 20 pounds occasionally or 10 pounds frequently, the ALJ totally ignored all of the medical evidence about the standing limitations and postural limitations of bending, stooping, squatting, climbing and reaching as assessed by Claimant's treating physicians, Dr. Karathanos, and Dr. Sutton. The ALJ disregarded even Dr. Andelman's testimony that "[Claimant] could sit for a couple of hours in sedentary work, when his back began to hurt, he could get up and move around and once his pain decreased, he could go back and sit again." (Tr. 158). The ALJ seemingly substitutes his own judgment for uncontroverted medical opinion, adopting portions of the medical opinions of Dr. McGovern and Dr. Andelman and completely ignoring the rest of the medical evidence. Kemp v. Bowen, 816 F.2d 1469 (10th Cir. 1987); Reyes v. Bowen, 845 F.2d 242, 244-45 (10th Cir. 1988); Frey v. Bowen, 816 F.2d 508 (10th Cir. 1987). The Tenth Circuit has held that the opinions of physicians who have treated a patient over a period of time are to be given greater weight than are reports of physicians who examined a claimant only once and a physician who has based his opinion solely on record evidence and hearing testimony. Washington v. Shalala, 37 F.3d 1437; also see Frey at 513, quoting Broadbent v. Harris, 698 F.2d 407, 412 (10th Cir. 1983). Further, it is the responsibility of the ALJ to resolve any inconsistencies in the

evidence as a whole and set forth a logical explanation of the individual's capacity to work. See 20 CFR §416.929 and §404.1529. Nevertheless, the ALJ failed to include the sitting, standing, and postural limitations, failed to resolve the inconsistencies in the medical evidence, and failed to provide adequate rationale for doing so. It should be noted the ALJ included these postural and sitting/standing limitations in the hypothetical questions to the vocational expert. (Tr. 171) Nonetheless, the ALJ's findings are not supported by substantial evidence. See Kemp v. Bowen, 816 F.2d 1469 (10th Cir. 1987).

Further, the ALJ also erred when completing the next two parts of the Step 4 analysis: he failed to make the necessary findings regarding the physical and mental demands of Mr. Deal's past relevant work and he failed to make the necessary findings regarding plaintiff's ability to do that work given his RFC. See Henrie v. United States Dep't. of Health & Human Serv's., 13 F.3d 359, 361 (10th Cir. 1993). While the inconsistencies of Claimant's testimony over the long administrative review process are acknowledged, the Record is replete with evidence of Mr. Deal's pain, which would indicate a capacity to perform less than the *full* range of light work. Plaintiff has been receiving treatment for arthritic pain since at least 1986 and continues to see the doctors once a month for follow-up and medication. There is evidence that Mr. Deal walks with a "pronounced" limp and had trouble sitting, standing and walking for prolonged periods of time. Mr. Deal testified he could not bend because of the pain, yet his work at

the car wash required constant bending. Mr. Deal testified he could not stand or sit more than a couple of hours without resting, yet his work at the car wash required 6-7 hours of walking/standing and no sitting. Claimant indicated his work at the Salvation Army required frequent lifting of up to 25 pounds, constant bending, 6-10 hours standing-walking, and from 2-4 hours sitting. Even Dr. McGovern found Claimant was not able to frequently bend and could only occasionally squat, climb or reach; could not lift/carry 21-25 pounds frequently but could lift/carry 11-20 pounds continually; and was capable of sitting only 1-2 hours at a time. (Tr. 500). Further, Dr. Andelman's conclusion that Claimant could "possibly" lift 20-30 pounds and could "possibly" do the work if he were able to complete a rehabilitation program is not substantial evidence for a finding of nondisability when considered in light of the other evidence in the Record. (Tr. 165, 167, 169). See Nieto v. Heckler, 750 F.2d. 59 (10th Cir. 1984). Significantly, the Tenth Circuit has held that "a Claimant must be able to perform the *full range* of such work on a daily basis in order to be placed in a particular RFC category. See Channel v. Heckler, 747 F.2d 577 (10th.Cir. 1984); Frey at 512.

As previously mentioned, the ALJ produced a vocational expert to assist in the determination of whether Claimant was capable of performing his past relevant work. (Tr. 168-180). In reviewing Claimant's occupations, the expert testified Mr. Deal's past relevant work included a dishwasher/janitor, which is an unskilled, light exertional position; a car wash attendant, which is also

unskilled but light to medium exertional level. Mr. Deal also worked as a disk grinder and heavy equipment operator, both of which were at the semi-skilled and medium exertional levels but were performed more than 15 years ago and not considered past relevant work. In response to the hypothetical posed by the ALJ, the expert indicated Claimant could not perform any semiskilled jobs and could perform only some of Claimant's past relevant work, that being the dishwasher/janitor and/or car wash attendant. (Tr. 171). Relative to the janitorial or custodial work, there were approximately 70,000 regionally and over 3,500,000 nationally. None were quantified for the car wash attendant position. The skills incorporated in the disk grinding occupation were transferable to light machinery operator or bench assembler, but none of these skills were highly marketable. There were approximately 6,000 light machinery positions regionally and over 250,000 nationally but about 50% of those jobs required a great deal of adjustment for Claimant. (Tr. 173). Of the bench assembler in the unskilled, sedentary level, there were approximately 60,000 regionally and over 3,000,000 nationally. Based on the Claimant's testimony and the environmental restriction on machinery, approximately 70% of the assembler positions would be eliminated. Accordingly, the ALJ established the Claimant's residual functional capacity as full range of light. However, the ALJ failed to adequately discuss and compare the specific physical requirements of Mr. Deal's duties as janitor/cook/dishwasher or car wash attendant, or to include specific findings as to the physical

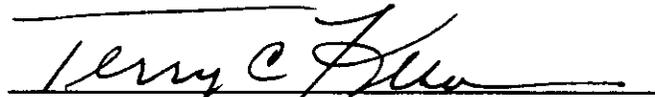
demands of Mr. Deal's former work.

III. CONCLUSION

As outlined above, because the ALJ failed to provide adequate rationale and to apply the correct legal standards, the Court finds that the ALJ's decision is not supported by substantial evidence. Therefore, the decision of the Secretary is REVERSED and REMANDED with instructions to remand the action to the Secretary for further proceedings consistent with this opinion.

It should be noted Plaintiff also presented additional argument in his Brief which would be relevant for a Step 5 analysis. However, there is no evidence the relevant Step 5 factors were considered. The ALJ made no explicit finding that claimant could do other work, given his RFC, age, education, and past work experience. 20 C.F.R. §404.1520(f). Instead, the ALJ terminated the evaluation process at the fourth step, determining Mr. Deal could return to his past work. (Tr. 18). Therefore, this Court will not address those additional arguments.

SO ORDERED THIS 7 DAY OF February, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE FEB 9 1995

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FEB 4 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DANNY OLEN HARRISON,)
)
 Plaintiff)
)
 vs.)
)
 FRED H. DEMIER, et al.)
)
 Defendants)

Civil Action No. 94-C-983-K

Ottawa County District Court
Case No. CV-94-440

AGREED JUDGMENT

Now, upon this 7 day of Feb., 1994, this matter comes on for hearing and the Court, upon reviewing the file and upon hearing the evidence and the arguments of counsel, does find and IT IS HEREBY ORDERED ADJUDGED AND DECREED as follows:

1. By deed dated June 26, 1975, Defendants Robert Whitebird and Ruby Pauline Whitebird, husband and wife, conveyed to Phillip A. Romick, Jr. and Josefina Gloria Romick the following described property:

A tract of land beginning 25 ft. north of the southeast corner of the NE/4 SE/4 of Section 5, T.28N, R.24E; thence north 208.71 ft.; thence west 208.71 ft; thence south 208.71 ft; thence east 208.71 ft to the point of beginning, containing one (1) acre, more or less, LESS AND EXCEPT all mineral interests therein.

Said tract is hereinafter referred to as Tract I. By mesne conveyances, said property is now owned of record by Plaintiff.

2. The parties have discovered that said deed should have reflected the following legal description:

A tract of land located in the NW/4 SW/4 of Section 4, T.28N., R. 24E, Ottawa County, Oklahoma, being more particularly described as follows: Beginning at the SW corner of the NW/4 SW/4 of Section 4, thence North for a distance of 208.71 ft., thence East for a distance of 208.71 ft., thence South for a distance of 208.71 ft, thence West for a distance of 208.71 ft. to the point of

beginning, containing one (1) acre, more or less, LESS AND EXCEPT all mineral interests therein.

Said tract is hereinafter referred to as Tract II. Plaintiff currently resides on Tract II.

3. The deed executed by Robert A. Whitebird, Sr., and Ruby Pauline Whitebird referred to in Paragraph 1 above, is hereby reformed to reflect the conveyance of Tract II to Phillip A. Romick, Jr. and Josefina Gloria Romick. In addition, the following deeds are reformed to reflect the conveyance of Tract II:

<u>Grantor</u>	<u>Grantee</u>	<u>Date</u>
Phillip A. Romick, Jr. and Josefina Gloria Romick	Housing Authority, Cherokee Nation of Oklahoma	March 5, 1976
Housing Authority, Cherokee Nation of Oklahoma	Josefina Gloria Romick	January 29, 1980
Josefina Gloria Romick now Demier and Fred H. Demier	Danny Olen Harrison	February 9, 1980

4. The Court finds that the Department of the Interior, United States of America, owns the surface and minerals of Tract I and the minerals underlying Tract II in trust for Robert A. Whitebird, Sr. and that Danny Olen Harrison owns the surface of Tract II.

5. The Court hereby orders the Plaintiff to erect a fence separating Tract II from Tract I and from any other trust properties owned by the Department of the Interior, United States of America within 30 days of the date of this order. Said fence shall be erected within 30 days of the date of this order. Plaintiff is not required to replace an existing fence.

6. The Court further orders Plaintiff to remove or clear any liens, deeds or claims existing against Tract I which may

constitute a cloud on the title of Tract I, including but not limited to any mortgages against Tract I. The removal of said liens or claims shall be concluded by Plaintiff within 30 days of the date of this order.

Dated this the 7 day of February, 1995.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED BY:



PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, OK 74103-3809
(918) 851-7463



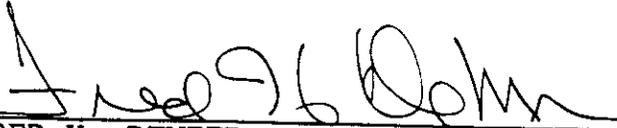
ALAN R. WOODCOCK
Office of the Field Solicitor
Department of the Interior
Attorneys for Defendants
Robert A. Whitebird, Sr., and
Ruby Pauline Whitebird

APPROVED BY:

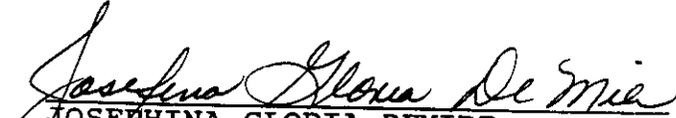
A handwritten signature in black ink, appearing to read 'Phil Frazier', written over a horizontal line.

PHIL FRAZIER
Attorney for Plaintiff
Danny Olen Harrison

APPROVED BY:

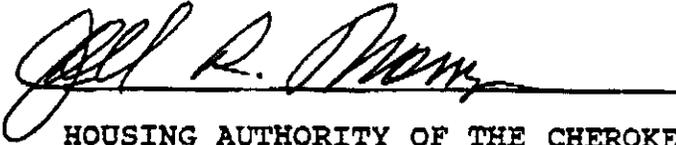


FRED H. DEMIER
3106 Shadowview Drive
Claremore, OK 74017



JOSEPHINA GLORIA DEMIRE
a/k/a JOSEPHINA GLORIA ROMICK
3106 Shadowview Drive
Claremore, OK 74017

APPROVED BY:

A handwritten signature in cursive script, appearing to read "J. R. Perry", is written over a solid horizontal line.

HOUSING AUTHORITY OF THE CHEROKEE NATION OF OKLAHOMA
115 West Shawnee
Tahlequah, OK 74464

ENTERED ON DOCKET
DATE FEB 09 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDDIE LEE LAMBERT,
Petitioner,
vs.
DAN REYNOLDS,
Respondent.

No. 93-C-658-K

FEB 09 1995
Richard M. Lawton, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner Eddie Lee Lambert, currently confined in the Oklahoma Department of Corrections at McAlester, Oklahoma, challenges pro se the judgment and sentence for Second Degree Burglary in Tulsa County District Court, entered in Case No. CF-89-4033. Respondent has filed a Rule 5 Response to which Petitioner has not replied. As more fully set out below, the Court concludes that the petition for a writ of habeas corpus should be denied.

I. BACKGROUND

On September 21, 1989, police officers were called to the Tulsa home of Glen and Robin Rogers after a jogger, Walter Gund, heard the sound of breaking glass and saw a figure near the corner of the house as he passed by the Rogers's house. The jogger also saw a gray car with the hood and trunk open. Patsy Lewis went by the Rogers's house after Gund came to her house to call the police. Lewis saw the same car and testified that there was a tag on the

front of the car that said "Turbo." Both Gund and Lewis testified that there was no one in the car and only one man standing beside it.

When Jenks police officer Gary Head arrived in the area he saw the grey car with three passengers, heading away from the scene. When he turned to follow the car, the occupants of the vehicle threw a beer can and a box out of the window. Another witness testified that she saw a pair of gloves being tossed out of the car as well. It was later determined that the box was actually a drawer full of items that had been taken from the Rogers's home.

The officer stopped the car and placed Eddie Lee Lambert (the Petitioner in this case), Buddy Lee Simon, and Brian Keith Levrets under arrest. Petitioner had a large cut on his hand which had been bleeding fairly heavily. A search of the Rogers's house later revealed a broken basement window with blood on it.

At the police station, Levrets stated that Simon had nothing to do with the burglary and was only the lookout. Officer Head recounted this statement at the joint trial of Petitioner, Levrets, and Simon. Petitioner was found guilty of Burglary in the Second Degree, After Former Conviction of Two or more felonies, and was sentenced to serve seventy-five years in the custody of the Oklahoma Department of Corrections. On direct appeal, Petitioner argued (1) that the trial court erred when it allowed testimony concerning the confession of a non-testifying co-defendant; (2) that his trial should have been severed from that of his co-defendants; (3) that the prosecutors made improper comments at the

trial; and (4) that he received the ineffective assistance of counsel at trial due to an impermissible conflict of interest. The Oklahoma Court of Criminal Appeals affirmed the judgement and sentence in an unpublished opinion. The Court analyzed Petitioner's first three claims as separate allegations of ineffective assistance of counsel because counsel had neither made a contemporaneous objection at trial nor filed a motion for severance. Lambert v. State, No. F-90-1110 (Okla. Crim. App. Feb. 21, 1992) (unpublished opinion attached as ex. B to doc. #6.)

In the present petition for a writ of habeas corpus, Petitioner again alleges that he received ineffective assistance of counsel as a result of the multiple representation, and that his constitutional rights were violated as a result the joint trial and of the non-testifying co-defendant's confession. The Court liberally construes Petitioner's last two grounds as instances of alleged ineffective assistance of trial counsel.

II. ANALYSIS

As a preliminary matter, the Court finds that Petitioner meets the exhaustion requirements under the law and that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record. See Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992). Next the Court addresses Petitioner's claim that he received ineffective assistance because of a conflict of interest as a result of multiple representation.

"Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." Wood v. Georgia, 450 U.S. 261, 271 (1981). Because Petitioner failed to raise a Sixth Amendment objection to joint representation at trial, his conviction can only be disturbed upon a showing that an "actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348-50 (1980); Selsor v. Kaiser, 22 F.3d 1029, 1032 (10th Cir. 1994); Church v. Sullivan, 942 F.2d 1501, 1510 (10th Cir. 1991).

In order to establish ineffective assistance of counsel, a Petitioner must show (1) that his counsel's performance was deficient, and (2) that the deficiencies prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Where it is alleged, as in this case, that ineffective assistance was the result of a conflict of interest, there are special considerations that apply. "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler, 446 U.S. at 349-50.

Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. . . . [A] conflict may . . . prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another.

Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978). In defining

what constitutes a "conflict of interests," Justice Marshall stated that "an actual, relevant conflict of interests [exists] if, during the course of the representation, the defendants' interests do diverge with respect to a material factual or legal issue or to a course of action." Cuyler, 446 U.S. at 356 n.3.

After carefully reviewing the record in this case, the Court concludes that Petitioner did not find himself in the situation contemplated by the Supreme Court in Cuyler and is, therefore, not entitled to habeas corpus relief. As stated more fully below, any error made by defense counsel in allowing the statement of Petitioner's co-defendant was harmless at best. Similarly, Petitioner was not entitled to a severance. There was no antagonism among the three defendants and defense counsel asserted the same defense for all of them.

A. Non-testifying Codefendant' Confession

In support of his first ineffective assistance of counsel claim, Petitioner alleges that the trial court erred in admitting a non-testifying co-defendant's confession through the testimony of officers Roberts and Head. The testimony of officer Roberts was as follows:

Q. [By prosecutor] After that occurred, did you have an opportunity to talk to Mr. Levrets?

A. [By Detective] Yes.

Q. And what did he indicate to you, at that point and time?

A. He made a written statement, which was very, that basically said that he was the look-out, that the car had broken down, and he was the look-out. And then he read

the statement. I asked him to read the statement. It has a warning on the statement. And I asked him to give us a statement, if he wished to, and to sign it, but to read it first. He did so. He made a brief statement, and he even changed some items on the statement, and I had him initial those changes. After he made the written statement, he kept saying that Mr. Simon had nothing to do with it, that he was just with the car, he didn't know anything about it, and that he was the look-out, but he wasn't going to finger anybody or rat on anybody, or something to that effect, but he did admit to being a look-out.

(Tr. at 107.)

Officer Head testified that Levrets "told us that he was there. His brother-in-law [Simon] didn't have anything to do with it. He didn't want his brother-in-law to get in trouble because his wife was going to kill him, and that he was just a look-out guy, that he had never went in the house." (Tr. at 62-63.)

The Oklahoma Court of Criminal Appeals found that an error under the Confrontation Clause occurred when Officer Head repeated Levrets's statements because Petitioner did not have an opportunity to cross examine Levrets. The Court concluded, however, that the error was harmless under Chapman v. California, 386 U.S. 18 (1967), because "the admission of the improper statements did not reasonably affect the veracity of the jury's verdict." Lambert v. State, slip op. at 4 (attached as ex. B to doc. #6). Relying on Harrington v. California, 395 U.S. 250 (1969) (analyzing trial errors under the Chapman harmless error standard), the Court found ample evidence which actually implicated Petitioner to a far greater extent than did the statements by co-defendant Levrets.

Respondent argues that no Confrontation Clause violation occurred because the co-defendant's statement in question did not

mention Petitioner nor implicate him in any crime. In any case, even if error occurred, Respondent argues that the error was harmless under Chapman.

The Sixth Amendment to the Constitution provides, in pertinent part, that "[i]n all criminal prosecution, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "[T]he right of cross-examination is included in the right of an accused in a criminal case to confront witnesses against him." Pointer v. Texas, 380 U.S. 400, 404 (1965). That right of an accused to cross-examine witnesses against him or her is a major reason underlying the Confrontation Clause. Id. 406-07.

Even if the admission of and reliance upon the co-defendant's statements in this case could be said to have violated Petitioner's Confrontation Clause rights under Bruton v. United States, 391 U.S. 123 (1968), the Court concludes that such a violation was harmless error and therefore does not entitle Petitioner to habeas relief.

Prior to the Supreme Court's decision in Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710 (1993), the standard for determining whether a conviction must be set aside because of federal constitutional error was whether the error "was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). The error now must have "'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht, 113 S.Ct. at 1722 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). "Under this standard, habeas petitioners may obtain

plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" Brecht, 113 S.Ct. at 1722 (cited case omitted). "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Sullivan v. Louisiana, ___ U.S. ___, 113 S.Ct. 2078, 2081 (1993).

The Supreme Court has acknowledged "the impossibility of determining whether in fact the jury did or did not ignore [the] statement inculcating petitioner in determining petitioner's guilt," Bruton, 391 U.S. at 136, but has suggested that whether error is harmless in a particular case depends upon a host of facts, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony . . . and, of course, the overall strength of the prosecution's case." Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

Application of the Brecht-Sullivan standard to this case leads this Court to conclude that the admission of the co-defendant's statement did not have a substantial injurious effect or influence in determining the jury's verdict. Even without this testimony, the evidence against Petitioner was overwhelming. As the Oklahoma

Court of Criminal Appeals stated:

Several witnesses observed three men drive away from the Rogers' house in the grey car, immediately after the breaking of the glass. In addition, the alarm of the Rogers' house went off soon after Officer Head saw items being thrown from the car. Head observed Appellant's injured hand and also found blood on the broken window. Co-defendant Simon admitted that the men were in the area, however, he claimed that it was due to the break down of the car.

(Ex. B at 4, attached to doc. #6.)

Accordingly, the Court concludes that Petitioner's trial counsel did not provide ineffective assistance when he failed to object to the testimony of officers Head and Roberts regarding the confession of a non-testifying co-defendant.

B. Severance

In support of his last claim of ineffective assistance of trial counsel, Petitioner contends that counsel's failure to file a motion for separate trials violated his Sixth Amendment rights. On direct appeal, the Court of Criminal Appeals found that the same defense was asserted by all three defendants and that no antagonism between the co-defendants could be gleaned from the record. (Ex. B attached to doc. #6.)

Because there is a strong policy in favor of joint trials when the charges will be proved by the same series of acts and events, Boyd v. State, 743 P.2d 674 (Okla. Crim. App. 1987), a separate trial will not be warranted unless the Petitioner can show that the existence of antagonistic defenses confused the jury, United States v. Horton, 847 F.2d 313, 317 (6th Cir. 1988). Mere conflicting

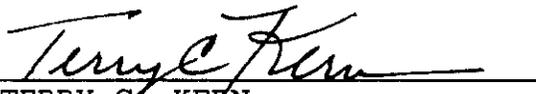
defenses are not sufficient to warrant severance. See United States v. McClure, 734 F.2d 484 (10th Cir. 1984); Master v. State, 702 P.2d 375, 378 (Okla. Crim. App. 1985).

After carefully reviewing the record in this case, the Court finds that failure to request a separate trial did not fall below an objective standard of reasonableness. The same defense was asserted by all three defendants and no antagonism between the co-defendants can be discerned from the record. Therefore, Petitioner is not entitled to habeas relief on his last ground of error.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. Accordingly, the petition for a writ of habeas corpus is hereby **denied**.

SO ORDERED THIS 7 day of February, 1995.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
FEB 09 1995
DATE _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 08 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

WILLIAMS PIPE LINE COMPANY,)

Plaintiff,)

vs.)

EMPIRE GAS CORPORATION,)

Defendant.)

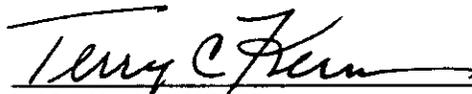
No. 94-C-83-K

JUDGMENT

This matter came before the Court for consideration of the defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendant and against the plaintiff.

ORDERED this 7 day of February, 1995.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE FEB 09 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GLENN W. PARKER,
Plaintiff,

vs.

DONNA E. SHALALA, SECRETARY
OF HEALTH & HUMAN SERVICES,

Defendant.

No. 93-C-0626-K ✓

FEB 9 1995

Richard H. ... Clerk
U.S. District Court
Northern District of Oklahoma

ORDER

Under 42 U.S.C. §405(g), Glenn W. Parker, Plaintiff, appeals the Secretary's denial of benefits under Title XVI for supplemental security income benefits and Title II for social security disability insurance benefits. The issue before the Court is whether the decision of the Secretary is supported by substantial evidence. Plaintiff contends the Administrative Law Judge erred in the assessment of claimant's residual functional capacity by failing to include all his impairments and to consider their effect in combination, and by failing to adequately compare and make specific findings of fact as to the physical and mental demands of his past work.

I. PROCEDURAL HISTORY

Claimant, a 52 year old man, filed for disability insurance benefits on May 2, 1991, alleging disability from October 1, 1990. His application was denied initially and on reconsideration.

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Claimant requested, and was granted, a hearing before an Administrative Law Judge ("ALJ"), who determined that claimant was not disabled prior to expiration of claimant's insured status on March 31, 1991. The ALJ concluded that claimant was capable of returning to his past relevant work of machine operator, laborer, or custodian. When the Appeals Council declined review, the decision of the Secretary on November 12, 1992 became the final decision from which Plaintiff now appeals.

II. LEGAL ANALYSIS

To be found disabled under the law, an individual must have a medically determinable physical or mental impairment(s) of such severity which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months, so that he or she is not only unable to do his or her previous work but cannot, considering his or her age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. 42 U.S.C. §423(d)(1)(A) and 1382(c)(3)(A).

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)
2. A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).
3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).
4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).
5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere

scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

III. DISCUSSION

Claimant completed the twelfth grade and has some vocational training. His medical history includes osteoarthritis with positive RA factor, prostate problems, depression and alcohol abuse. (Tr. 215, 220). His work history included policeman, correctional officer, machine operator, lathe operator, caster, laborer, and janitor, and various odd jobs. He quit his school custodial job October 1, 1990, the alleged date of onset of disability, because he felt "discriminated against" and "ostracized." (Tr. 34-36, 60).

Mr. Parker testified he has pain in his shoulders, arms, hands, legs and joints because of osteoarthritis. He also has prostate problems causing urinary frequency. (Tr. 39, 132, 187, 252). He admits to drinking "quite a lot," usually a fifth of

vodka a day. (Tr. 49-50, 56). His appetite is poor but he denied any weight loss. (Tr. 48). Claimant also related feelings of depression and hallucinations. "Everybody's after me snakes... animals... dogs... cats... everything." (Tr. 51-53). These feelings occur "all the time" even when he is not drinking. As he explained, the snakes are "friendly" when he is not drinking as opposed to "mean" when he is drinking. (Tr. 53). He hears voices... "people singing... crying." (Tr. 55). Claimant states he cries "all the time" although he feels better afterward. He thinks about living/dying a lot and has attempted suicide on two occasions several years ago. (Tr. 54-55). He is tense, tired, feels "burned out," and has trouble concentrating. (Tr. 57, 59). In the recent past claimant has taken Prozac and Pamelor for his depression. However, only Naprosyn, twice daily for osteoarthritis, and aspirin for pain were listed by claimant on September 9, 1992. (Tr. 41-42, 257).

Although claimant testified he has "a maid come in" who does the cleaning, washing dishes and some laundry, according to the May 11, 1991 Disability Report which he completed, Mr. Parker is able to take care of himself, cooks "maybe twice a week," does his own housekeeping, and shops "when needed." He does not have a car but rides the bus when necessary. (Tr. 42-43, 113). He testified he walks about a mile a day, every other day, and the Disability Report he completed indicated he walked "three times a day." (Tr. 47, 113). He gets along well with others and socializes as often as he can. (Tr. 125). He attends church every Sunday if possible,

sings solos, likes to paint still-life pictures, and prays "every hour...all the time." (Tr. 44, 47, 113). An average day includes watching TV, visiting friends and walking. (Tr. 46, 56, 118).

Plaintiff contends he cannot return to his prior work because of the pain in his elbows, shoulders, legs and joints; does not like to be around people; has no patience to work and is unable to concentrate. (Tr. 41, 42, 58, 59).

Claimant has been treated at the Osteopathic Hospital for a brief period from January 24, 1991 to April 7, 1992, by various doctors. Claimant was examined by Dr. Denton on January 24, 1991, who found Mr. Parker did experience some slight decreased range of motion of all extremities from pain. Dr. Denton noted "present psychiatric functioning was within normal limits." Osteoarthritis was diagnosed and Feldene 20 mg. was prescribed. (Tr. 201-203). Claimant was followed for symptomatic treatment of the osteoarthritic pain and his depression:

2/4/91, "still experiencing joint pain, Feldene was of no help; also states that he feels depressed and has trouble sleeping at night";

2/12/91, "states pain much less in lower extremities but still has pain in upper extremities, also states his depression is improving";

2/18/91, "states he feels much better, states that he is nearly pain free";

3/4/91, "still has some pain in shoulders and wrists, states he is looking to get Vet loan and go back to school so he can have an alternative work source that requires less physical activity";

3/18/91, "feels better, still has some pain in shoulders, arms, wrist (less compared with previously)";

3/20/91, skin rash;

4/11/91, "tired all the time, feels run down, wants to sleep all the time, arthritis doing better still hurts a little, walks up and down Riverside only activity, sleeps well at night, may wake up 1-2 times to urinate, goes back to sleep easily";

4/18/91, "feeling a lot better, not so tired, getting out and doing things, affect - appropriate, good eye contact, improved over last week";

4/25/91, "feeling good, sleeping well";

5/10/91, "feels good, depression resolving." (Tr. 191-199).

Thereafter, in October 1991 Mr. Parker was diagnosed with prostatitis and treated with Bactrim and Hytrin. (Tr. 230-231, 235, 252). Claimant was again seen on December 18, 1991, and February 13, 1992, for follow-up of prostatitis with "no other complaints." (Tr. 233). On March 11, 1992, and a follow-up visit on March 16, 1992, it was noted "patient states he has been depressed over the idea he could have prostate cancer; he states his appetite isn't very good, no desire to eat, having trouble falling asleep and wakes up frequently and early, hard to get back to sleep, has been drinking a lot lately to help the depression." (Tr. 232) The last indication of claimant's treatment was on March 30, 1992, when Dr. Denton remarked "patient's depression kind of comes and goes; today he was in a better mood, went over options with him and decided he would stay with the Pamelor." Plaintiff was referred to Dr. Nulf for follow-up of treatment for prostatitis. (Tr. 230). In a letter dated April 7, 1992, Dr. Wiley stated "evidence of major depression with suicidal features and of alcohol dependence" were found in the mental status examination. (Tr. 186).

On three separate occasions plaintiff was examined by consultative physicians, whose opinions were generally consistent with the records of the Osteopathic physicians who treated/or examined Mr. Parker. Dr. Grubb examined Mr. Parker in July 1991,

and noted Mr. Parker had "adequate dexterity" to button buttons, turn pages of a book, and pick up small objects from the table. There was no joint deformity, redness, swelling or heat about his joints although there were slight decreased ranges of motion in his upper extremities. (Tr. 207-211). On August 27, 1991, claimant was examined by Dr. Farrar who diagnosed bilateral shoulder adhesive capsulitis. However, no evidence of synovitis or dermatome sensory loss was found throughout the wrists or elbows, and both Tinel's and Phalen's signs were negative. There was good gross and fine finger manipulative ability. The lower extremities revealed full ranges of motion with no evidence of synovitis. His cervical, thoracic and lumbar spine were unremarkable. He showed full ranges of motion in his spine with no evidence of appreciable abnormality. (Tr. 215-216). Neither of these doctors addressed the impact of Mr. Parker's limitations upon his ability to return to his former occupation.

Since the consultative examination by Dr. Passmore in October 1991 was the only neurological examination included in the Record, the findings must be given weight in considering Mr. Parker's mental condition. Dr. Passmore primarily repeated plaintiff's subjective complaints about claimant's daily activities, likes and dislikes, fears and hallucinations. It does not conclude that Mr. Parker's symptoms suggest a severe mental impairment. Instead, Dr. Passmore surmised claimant "does appear to be depressed and have some concomitant anxiety," and recommended he obtain treatment from a local mental health facility along with appropriate medication.

Dr. Passmore felt the stressors were primarily financial and ranged from moderate to severe. He found no looseness of association, or flight of ideas. (Tr. 220-221). Dr. Passmore felt claimant's hallucinations were possible but were more than likely "anxiety" related. At no point in the report does Dr. Passmore relate any of the examination findings to Mr. Parker's ability to return to his former work.

Additionally, the decision as to whether the claimant retains the functional capacity to perform past work which has current relevance must be developed and explained fully in the disability decision. In this case the ALJ made the following findings:

1. The claimant met the disability insured status requirements of the Act on October 1, 1990, the date the claimant stated he became unable to work, and continued to meet them through March 31, 1991.
2. The claimant has not engaged in substantial gainful activity since October 1, 1990.
3. The medical evidence establishes that the claimant has severe osteoarthritis, bilateral shoulder adhesive capsulitis, depression, anxiety, and alcohol abuse, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.
4. The degree of functional limitation the claimant alleges due to pain and other subjective complaints is not credible based on the reasons set forth herein.
5. The claimant has the residual functional capacity to perform the physical exertion requirements of work except for lifting/carrying 50 pounds occasionally or 25 pounds frequently, [and] interrelating appropriately with others.
6. The claimant's past relevant work as machine operator, laborer, custodian, odd jobs did not require the performance of work related activities precluded by the above limitations (20 CFR 404.1565 and 416.965).
7. The claimant's impairments do not prevent the claimant from performing his past relevant work.
8. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(c) and 416.920 (c)).
9. The claimant was not disabled on or before his date last insured.

(Tr. 16-17). In order for the ALJ to have determined that Mr. Parker has the residual functional capacity to return to his past relevant work, adequate documentation of claimant's past work must include factual information about those work demands which have a bearing on the medically established limitations. While the Court readily admits that it indeed took "a long time and persistent questioning to obtain sensible answers" from claimant, the Record is, nevertheless, devoid of any questions about tasks likely to produce anxiety or the stress demands of Mr. Parker's past relevant work. For the ALJ to summarily conclude that "temporary symptoms would not have that much effect on a low level job like janitor" is grossly inadequate. (Tr. 15). In considering a claim which involves mental/emotional impairment, care must be taken to obtain a precise description of the particular job duties which are likely to produce tension and anxiety, e.g., speed, precision, complexity of tasks, independent judgments, working with other people, etc., in order to determine if the claimant's mental impairment is compatible with the performance of such work." See S.S.R. 82-62. Mr. Parker indicated he could not perform the machine operator, laborer and janitorial work because of the pain in his shoulders, arms and hands resulting in his inability to grip, walk or bend, all of which were necessary in his prior work. (Vocational Report, Tr. 103). Claimant confirmed he has difficulty handling stress as well. (Disability Report, Tr. 110). Mr. Parker testified he did not like to be around people, had trouble concentrating, experienced hallucinations, and drank alcohol every day. (Tr. 48,

49, 51, 52, 53, 55, 59). In the present case, it is not apparent from a review of the transcript that a precise description, as explained above, of Mr. Parker's particular duties in conjunction with all of his impairments was obtained.

Notwithstanding, to assist in the determination of claimant's disability, several agency physicians assessed Mr. Parker's ability to perform work-related activities. On September 19, 1991, Dr. Thurman Fiegel completed a RFC assessment with the following evaluations: occasional lift and/or carry upward to 50 pounds; frequently lift and/or carry 25 pounds; stand, sit and/or walk about 6 hours in an 8-hour workday; unlimited push and/or pull, other than as shown for lift and/or carry. X-ray reports were normal; passive range of motion of back 80 degrees, but no neurological deficits and all other motions essentially full. Stooping was limited somewhat by pain, but claimant retained the ability for frequent climbing, balancing, kneeling, crouching and crawling. Although claimant's use of hands was normal, repetitive overhead reaching was limited. (Tr. 172-179). Similarly, Dr. Woodstock completed a residual physical functional capacity assessment on January 30, 1992. Dr. Woodstock evaluated Mr. Parker as having the ability to occasionally lift and/or carry up to 50 pounds; frequently lift and/or carry 25 pounds; stand, sit and/or walk about 6 hours in an 8-hour workday with unlimited ability to push/or pull. Again claimant's ability to reach repetitively overhead was limited as was his ability for more than occasional stooping. (Tr. 148-155).

On October 28, 1991, Dr. Miller completed a mental residual functional capacity assessment of claimant. He noted that claimant had the functional capacity to perform simple tasks, could relate adequately to co-workers and supervisors for superficial work relationship but could not tolerate active involvement with the public. (Tr. 159-162). A Psychiatric Review Technique form was also completed at the same time by Dr. Miller. In this PRT, claimant met the "A" criteria rating under 12.04, Affective Disorders, but failed to meet the necessary "B" criteria rating. Also, Dr. Janice Boon completed both a mental RFC assessment and PRT form on February 1, 1992. Dr. Boon noted claimant was able to understand, remember and carry out simple, but not detailed, instructions under routine supervision. Claimant's concentration was occasionally diminished but was adequate to complete simple tasks. She noted claimant could not relate effectively to the general public, but could relate superficially to co-workers and supervisors about work matters. (Tr. 137). On the PRT, claimant again met the "A" criteria rating under 12.04 but failed to meet the degree of functional limitation necessary in part "B". (Tr. 146).

Furthermore, the vocational expert testimony elicited by the ALJ during the hearing confirmed Mr. Parker would not be able to perform a janitorial job, given the testimony of the claimant. (Tr. 64, 69). Albeit, the expert testified some 70,000 light to medium exertional janitorial jobs would be available within the region and approximately 3,000,000 nationwide. (Tr. 65). Given

the limitations expressed in the hypothetical by plaintiff's counsel, claimant would not be able to function on a continued and sustained basis in the work environment:

Now, let's assume that we have a person whose 52 years old, a highschool graduate, who has worked as a machine operator, janitor, laborer, has not worked since October 1990, who stated that he quit his job because he couldn't get along with discrimination from other people, who stated that he can't work because of pain in the elbows, shoulders, leg joints, who has problems with being around other people, who drinks a fifth of vodka per day, ... who sees and hears things that aren't there... who has attempted suicide at least on two occasions, who cries daily all the time, who feels tired all the time and burned out, tense most of the, would that person be able to engage in their past work? (Tr. 68-69).

The expert responded negatively, explaining the things cited would interfere with his ability to concentrate, to perform adequately, and to render an unsafe environment for himself and others with whom he was working. (Tr. 69).

While the Court agrees that notations by the Osteopathic Hospital physicians indicated claimant's depression was improving, the only neurological consultative examination was inconclusive. There is not substantial evidence to adequately support a conclusion that Mr. Parker's mental condition was improving to the point whereby he may resume his previous work. Furthermore, there is insufficient evidence to support the ALJ's conclusion that "claimant's mental impairments, if any, and alcohol abuse have no effect on daily activities, no more than slight effect on social functioning, and seldom cause deficiencies of concentration, persistence or pace." The treating physicians indicated Mr. Parker was experiencing "major depression with suicidal tendencies and alcohol abuse." Dr. Passmore felt Mr. Parker appeared depressed

with concomitant anxiety. Even the nonexamining physicians significantly limited not only Mr. Parker's physical exertional ability, but also his nonexertional functional capacity in the work environment. Evaluation under Sections 404.1520(e) and 416.920(e) of the regulations requires careful consideration of the interaction of the limiting effects of the person's impairment(s) and the physical and mental demands of his or her past relevant work to determine whether the individual can still do that work. See S.S.R. 82-62.

Therefore, it is essential that the ALJ make a well-articulated finding as to the effect of all of claimant's impairments and the combined effect, if any, they have upon claimant's ability to return to his past work. Henrie v. U.S. Dept of Health & Human Services, 13 F.3d 359 (10th Cir. 1993). Furthermore, it is the responsibility of the ALJ to adequately develop the record in order to determine if the claimant's mental impairment, or combination of impairments, is compatible with the performance of such past work. Id. at 360. It is not apparent from the findings of fact that the ALJ considered all of Mr. Parker's impairments, or the combined effect of claimant's impairments. Nor is it apparent from the Record that the ALJ obtained detailed information about the claimant's particular job duties, including those which were likely to produce tension and anxiety, or that the ALJ included adequate rationale and made an appropriate comparison thereof in the findings of fact. See 20 C.F.R. §404.1520a(c)(4).

IV. CONCLUSION

Lacking adequate rationale for the conclusions reached, the decision of the ALJ is, therefore, not supported by substantial evidence. Thus, this Court is required to remand this matter to the ALJ with the following directions:

(1) to secure an adequate description of Mr. Parker's relevant job duties including those which would likely produce tension and anxiety and to consider and note in the findings of fact the comparison of these job requirements to the claimant's specific limitations;

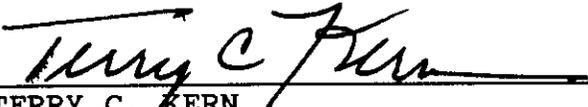
(2) (a) to consider and note the effect of Dr. Passmore's conclusion in conjunction with the diagnosis of the Osteopathic physicians regarding Plaintiff's mental condition and/or alcohol abuse; and (b) to consider and note in the findings of fact the effect that Mr. Parker's mental condition and/or alcoholism may have on his ability to return to his past relevant work; and,

(3) to consider all of Mr. Parker's impairments in combination and to include among the findings of fact the effect, if any, of his combined impairments on Mr. Parker's ability to return to his past relevant work.

In this connection, evidence will be obtained from a vocational expert regarding the demands of the claimant's past relevant work, if, after evaluating this work as stated above, it is found to be relevant in determining the impact of the claimant's limitations upon his occupational base.

Therefore, this matter is REVERSED and REMANDED to the Secretary for further proceedings consistent with this Order.

SO ORDERED THIS 8 DAY OF FEBRUARY, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 8 1995 *RL*

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MARCIA THOMPSON,)
)
Plaintiff,)
)
vs.)
)
OKLAHOMA CENTRAL CREDIT UNION,)
)
Defendant.)

Case No. 94-C-562-BU ✓

FEB 08 1995

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 1st day of February, 1995.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 7 1995 *ll*

DONALD LEROY HAWKINS,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION, et al.,)
)
 Respondent.)

No. 93-C-0049-BU ✓

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE FEB 08 1995

ORDER

On January 11, 1995, the Court advised Petitioner that his failure to show cause on or before fifteen days (whether he is still pursuing this habeas corpus action for inordinate delay of his direct criminal appeal) would result in the dismissal of this habeas action. The Petitioner has not responded.

ACCORDINGLY, IT IS HEREBY ORDERED that this habeas corpus action is **dismissed** for lack of prosecution and for failure to establish some form of particularized prejudice under Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994).

SO ORDERED THIS 6 day of Feb, 1995.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DAVID TYLER,)
)
 Plaintiff,)
)
 vs.)
)
 THE ORIGINAL CHILI BOWL INC.,)
 a corporation in the State of)
 Oklahoma, KEEBLER COMPANY, a)
 corporation in the State of)
 Delaware, JOHNNY WELCHER,)
 LEE SHAFER, JOHN POWERS and)
 DELPHA PITTS,)
)
 Defendants.)

DATE 2-8-95

No. 94-C-601-B

FILED

FEB 7 1995

lw

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

O R D E R

The Court has for decision Plaintiff's motion to remand and Defendants' motion to dismiss.

In Plaintiff's state court petition he alleges two claims for relief. The first is for "wrongful discharge in violation of Oklahoma public policy" and the second is for "defamation." Plaintiff alleges regarding wrongful discharge in violation of Oklahoma public policy that his employment with Defendant, The Original Chili Bowl Inc., was terminated after he brought to his employer's attention violations of 21 U.S.C. § 342 (Food, Drug, and Cosmetic Act) and after he attempted to organize fellow employees into a labor union, in violation of 29 U.S.C. §§ 102 and 158 (Labor Management Relations Act).

For purposes of removal and/or remand, the Court must look solely to Plaintiff's complaint (petition) in determining if a federal claim is stated. Mountain Fuel Supply Company v. Johnson, 586 F.2d 1375, 1380 (10th Cir. 1978), *cert. denied*, 441 U.S. 952, 99

S.Ct. 2182, 60 L.Ed.2d 1058 (1979).¹ A diversity of citizenship claim is not alleged.

Plaintiff specifically alleges a tortious breach of Defendant's employment contract in alleged violation of the public policy of Oklahoma. Thus, if Oklahoma's public policy embraces said federal acts, and Plaintiff was terminated for lawfully complying therewith, Plaintiff may prove a tort claim under Oklahoma state law. Burk v. K-Mart Corporation, 770 P.2d 24 (Okla. 1989); Tate v. Browning-Ferris Inc., 833 P.2d 1218 (Okla. 1992); Davis v. American Airlines, 971 F.2d 463 (10th Cir. 1992); and Hawaiian Airlines Inc. v. Norris, 9 IER Cases 929 (U. S. Supreme Court, June 1994). If said federal statutes are not part of Oklahoma public policy, no claim under Oklahoma state law has been stated in reference to Plaintiff's first claim for relief. This, however, is a matter for the state court to decide.² A reasonable reading of Plaintiff's complaint (petition) compels a conclusion that Plaintiff does not allege or attempt to allege a cause of action under federal law. Plaintiff specifically attempts by his

¹Plaintiff's First Amended Complaint filed herein on July 29, 1994, essentially alleges the same two claims.

²In Burk, the Oklahoma Supreme Court adopted a limited "public policy exception to the at-will termination rule in a narrow class of cases in which the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law." *Id.* at 28. The Oklahoma Supreme Court recognized "the vague meaning of the term public policy," and stated that such public policy exceptions should be "tightly circumscribed." *Id.* at 28-29.

first claim for relief to allege an Oklahoma public policy tort claim. The second claim for defamation is exclusively state-law based as well.

For the reasons stated, Plaintiff's motion to remand is hereby sustained, and Defendants' motion to dismiss is thus moot, to be hereafter addressed by the state court.

IT IS SO ORDERED this 7th day of February, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 2-8-95

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 MARIWANA HUSSAINI-IBRAHIM, aka)
 M. Hussaini-Ibrahim aka Mariwana)
 Hussaini; MAGALENE I. HUSSAINI,)
 aka Magalene Ferguson; LANTANA)
 AHMED; TULSA ADJUSTMENT BUREAU,)
 INC.; CITY OF BROKEN ARROW,)
 Oklahoma; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD)
 OF COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

Case No. 94-C-578-B ✓

FILED

FEB 7 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

O R D E R

Before the Court for consideration is a Motion for Summary Judgment (Docket #14) filed by Plaintiff United States of America against Defendant Mariwana Hussaini-Ibrahim ("Hussaini-Ibrahim"). Plaintiff seeks summary judgment against Hussaini-Ibrahim only in this foreclosure action; the remaining defendants are not involved in this motion.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Widon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, the court

16

stated:

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

* * *

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary

judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

As Defendant Hussaini-Ibrahim has not responded to Plaintiff's Motion for Summary Judgment, the following facts are not in dispute:

1. This is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property, located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Sixteen (16), Block One (1), WINDSOR ESTATES SECOND, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

2. On September 23, 1986, Keith H. Mackie and Evelyn S. Mackie executed and delivered to Firstier Mortgage Co. their mortgage note in the amount of \$85,600, payable in monthly installments, with interest thereon at the rate of 10 percent per annum (Plaintiff's Exhibit A).

3. As security for payment of the above-described mortgage note, Keith H. Mackie and Evelyn S. Mackie, Husband and Wife, executed and delivered to Firstier Mortgage Co., a mortgage dated September 23, 1986, and recorded on September 30, 1986, in Book 4973, Page 301 in the record of Tulsa County, Oklahoma (Plaintiff's Exhibit B).

4. On November 30, 1987, Firstier Mortgage Co. assigned the

mortgage note and the mortgage to Leader Federal Savings & Loan Association by an instrument recorded on January 8, 1988, in Book 5073, Page 2794-2795, in the records of Tulsa County, Oklahoma (Plaintiff's Exhibit A).

5. On September 7, 1988, Leader Federal Savings & Loan Association assigned the mortgage note and the mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, by an instrument recorded on September 7, 1988, in Book 5126, Page 1344-1345, in the records of Tulsa County, Oklahoma (Plaintiff's Exhibit A).

6. On September 11, 1987, Keith H. Mackie and Evelyn S. Mackie granted a general warranty deed to Hussaini-Ibrahim. This deed was recorded with the Tulsa County Clerk on September 10, 1987, in Book 5050 at Page 1950, and Hussaini-Ibrahim assumed payment of the amount due pursuant to the note and mortgage described above (Plaintiff's Exhibit C).

7. On August 16, 1988, Hussaini-Ibrahim entered into an agreement with the Plaintiff suspending for a period of one year the monthly installments due in exchange for the Plaintiff's forbearance of its right to foreclose due to Hussaini-Ibrahim's default in paying the installments. Superseding agreements were reached on November 1, 1989, September 15, 1990, and April 1, 1991 (Plaintiff's Exhibits D, E, F, and G).

8. The Defendant County Treasurer, Tulsa County, Oklahoma, has an interest in the subject property by virtue of property taxes that are currently due (Answer of Tulsa County Treasurer, filed

July 13, 1994).

9. Defendants Magalene I. Hussaini and Lantana Ahmed have had a default entered against them and have no right, title or interest in the subject real property (Clerk's Entry of Default, filed January 17, 1995).

10. On December 5, 1994, Plaintiff mailed Requests for Admissions to Hussaini-Ibrahim through his attorney, Marcus S. Wright. (Plaintiff's Exhibit B). Hussaini-Ibrahim has not responded to the Request for Admissions.

11. Hussaini-Ibrahim defaulted under the terms of the note and mortgage by reason of his failure to make the monthly installments due. The default has continued, and Hussaini-Ibrahim is indebted to the Plaintiff in the principal sum of \$138,019, which represents \$85,082.36 in unpaid principal, \$48,616.07 in accrued but unpaid interest and \$4,321.11 in penalties and service charges, plus interest at the rate of 10 percent per annum from May 18, 1994, until judgment, plus interest thereafter at the legal rate until fully paid. (Deemed admitted pursuant to Fed.R.Civ.P. 36, due to Hussaini-Ibrahim's failure to respond to Request for Admissions).

No material issues of fact are in dispute in the evidence before the Court; therefore, Plaintiff is entitled to judgment as a matter of law. Plaintiff's Motion for Summary Judgment as against Defendant Hussaini-Ibrahim is hereby GRANTED. The Plaintiff is directed within seven days of the date of this Order to submit a proposed Judgment in keeping with the Court's Order sustaining the Motion for Summary Judgment.

IT IS SO ORDERED THIS 12th DAY OF FEBRUARY, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE ~~FEB 08 1995~~

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ERNESTINE HARRISON,)

Plaintiff,)

v.)

BRISTOW HOUSING)

AUTHORITY, et al.,)

Defendants.)

Case No. 93-C-638-K

FILED

FEB - 2 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL

At Pre-trial conference held before the Court, Defendants Bristow Housing Authority and Geneva Drummond appeared by and through their attorney of record, Steven R. Hickman, but Plaintiff, acting pro se, did not appear. The Court ordered this case dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above styled and numbered cause be and same is hereby dismissed.

DATED this 31 day of January, 1995.

s/ TERRY C. KERN

Terry C. Kern, United States District Judge

Copy

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**
NORTHERN DISTRICT OF OKLAHOMA

FEB - 7 1995

KAREN B. MERRELL)
)
 Plaintiff,)
 v.)
)
 THE HARDESTY COMPANY, INC. and)
 HARDESTY REALTY CORP.,)
)
 Defendants.)

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

Case No. 92-C-1153-BU

ENTERED ON DOCKET
DATE 2-8-95

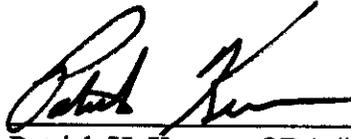
STIPULATION OF DISMISSAL BY ALL PARTIES

Pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure, the undersigned counsel hereby stipulate and state as follows:

1. The undersigned counsel represent all of the parties who have appeared in the above styled and numbered case.
2. The Plaintiff, Karen B. Merrell, does hereby dismiss all claims which she has against the Defendants, The Hardesty Company, Inc., and Hardesty Realty Corp., **with prejudice**, to the refiling of those claims at a later date.
3. The Defendants, The Hardesty Company, Inc., and Hardesty Realty Corp., hereby dismiss **with prejudice** all claims which they have against the Plaintiff, Karen B. Merrell.
4. The parties have reached a settlement of their respective claims against each other and the settlement reached is inclusive of all attorney fees, costs and related expenses incurred in connection with this litigation.

This notice and stipulation dated the 7 day of February, 1995.

Respectfully submitted,



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Attorneys for Defendants The Hardesty
Company, Inc., and Hardesty Realty Corp.

PHK/shg/5408.001/10007139

ENTERED ON DOCKET
FEB 07 1995
DATE _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB - 6 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

CREEK COUNTY RURAL WATER DISTRICT)
NO. 2, an agency and legally)
constituted authority of the)
STATE OF OKLAHOMA,)

Plaintiff,)

vs.)

CITY OF TULSA, a municipality,)
and THE TULSA METROPOLITAN)
UTILITY AUTHORITY, a public)
trust,)

Defendants.)

Case No. 94-C-1052-B ✓

O R D E R

Before the Court for consideration are a Motion to Dismiss (Docket #6) and a Motion to Change Response Time (Docket #7) filed by Defendants City of Tulsa ("Tulsa") and Tulsa Metropolitan Utility Authority ("TMUA").

Plaintiff Creek County Rural Water District No. 2 ("Creek-2") alleges that Tulsa and TMUA have been selling water within Creek-2's territory, thereby violating Creek-2's rights under 7 U.S.C. § 1926(b) against competition from neighboring municipalities.¹ Creek-2 contends that the Defendants violated 42 U.S.C. § 1983 by depriving it of its federal rights under § 1926(b), and that the Defendants breached a Water Supply Contract between them and Creek-

¹This statute protects rural water districts indebted to the federal government, as is Creek-2, against "competitive facilities", especially those that would be developed as a result of the expansion of neighboring municipalities. Rural Water District No. 3 v. Owasso Utility Authority, 530 F.Supp. 818 (N.D.Okla. 1979).

2.² Creek-2 also seeks a declaratory judgment regarding the rights of Tulsa and TMUA to sell water within Creek-2's territory, and a "reasonable compensation" that Tulsa must pay for its past and future sales of water within Creek-2's territory.

The Defendants filed a Motion to Dismiss, alleging that the Court has no subject-matter jurisdiction. They allege that the Complaint merely states a breach of contract claim, and that there is no federal question sufficient to confer jurisdiction under 28 U.S.C. § 1331. "Plaintiff's claims will succeed or fail depending upon the facts and the construction given the contract between the parties; not a federal law." (Defendants' Motion to Dismiss, p.5).

Under the "well-pleaded complaint" rule, federal question jurisdiction must be apparent from the face of the plaintiff's complaint. Oklahoma Tax Commission v. Graham, 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989). The Court believes that Creek-2 has stated a federal claim sufficient to confer federal question jurisdiction. Creek-2 alleges that the Defendants violated § 1983 by selling water within Creek-2's territory, thereby depriving Creek-2 of its federal rights under § 1926(b). Whether the Water Supply Contract means that Creek-2 has contracted away its rights under § 1926(b), or whether the contract would provide a sufficient affirmative defense, does not affect the question of jurisdiction. Therefore, Defendants' Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(1) is hereby DENIED in part.

²The contract apparently allows the Defendants to sell water in Creek-2's territory provided certain conditions are met.

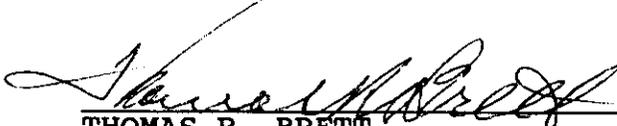
Defendants also state that Creek-2's claim for punitive damages should be dismissed, because punitive damages are not recoverable against a municipality. The Court agrees. The United States Supreme Court clearly has stated that "a municipality is immune from punitive damages under 42 U.S.C. § 1983", which is the statute Creek-2 is suing under in this case. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 101 S.Ct. 2748, 2762, 69 L.Ed.2d 616 (1981). See also Asbill v. Housing Authority of the Choctaw Nation, 726 F.2d 1499 (10th Cir. 1984) ("The Newport decision rested, in part, upon the notion that an entity is incapable of malice, and that an award of punitive damages 'punishes' only the taxpayers.") Therefore, Defendants' Motion to Dismiss is hereby GRANTED in part; Creek-2's request for punitive damages is dismissed.

On December 22, 1994, Defendants filed a request for extension of time in which to respond to Creek-2's Motion for Partial Summary Judgment, which was filed December 13, 1994.³ Because Creek-2 objected to the request, the Court was unable to rule on the request before the response was due; therefore, Defendants filed a response. However, within their response, they reurged their motion, requesting the opportunity to file an amended response after a discovery period. The Court hereby GRANTS Defendants' application to file an amended response after discovery. Such amended response must be filed by March 6, 1995. Creek-2 may file

³The Complaint was filed on November 10, 1994.

an amended reply within 11 days after Defendants' amended response is filed.

IT IS SO ORDERED THIS 6th DAY OF FEBRUARY, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FEB 7 1995 *PL*

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

HERMAN L. ADAMSON,)
)
 Plaintiff,)
)
 vs.)
)
 STATE OF OKLAHOMA, AND)
 THE STATE OF OKLAHOMA WORKER'S)
 COMPENSATION COURT,)
)
 Defendants.)

Case No. 94-C-1192-BU

ENTERED ON DOCKET

DATE FEB 07 1995

ORDER

On January 9, 1995, Plaintiff, Herman L. Adamson, filed an affidavit of financial status seeking leave to proceed in this action in forma pauperis. Upon review of the financial affidavit, the Court granted Plaintiff leave to file his "Petition for Writ of Certiorari" in forma pauperis.

When a complaint is filed in forma pauperis, the Court may test the complaint under 28 U.S.C. § 1915(d). If found to be frivolous, improper or obviously without merit, the complaint may be subject to summary dismissal. Henriksen v. Bentley, 644 F.2d 852, 853 (10th Cir. 1981). As the Supreme Court explained in Neitzke v. Williams, 490 U.S. 319 (1989), section 1915(d)

"accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless. Examples of the former class are claims against which it is clear that the defendants are immune from suit, see, e.g., Williams v. Goldsmith, 701 F.2d 603 (CA7 1983), and claims of infringement of a legal interest which clearly does not exist. . . . Examples of the latter class are claims describing fantastic or delusional scenarios, claims with which federal district judges are all too

familiar."

Id. at 327-328.

In his complaint, Plaintiff has named the State of Oklahoma and the State of Oklahoma Worker's Compensation Court as Defendants. Construing Plaintiff's allegations liberally, see, Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), Plaintiff claims that Defendants denied him a fair trial in violation of the Sixth and Fourteenth Amendments. Plaintiff also claims that Defendants' conduct violated the Fifth and Ninth Amendments. Testing the complaint under section 1915(d), the Court finds that dismissal of Plaintiff's claims is appropriate.

The Eleventh Amendment to the United States Constitution provides in pertinent part:

"[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State"

U.S. Const. Amend. XI. The United States Supreme Court has stated that although "[t]his language expressly encompasses only suits brought against a State by citizens of another State, . . . the Amendment bars suits against a State by citizens of that same State as well." Papasan v. Allain, 478 U.S. 265, 276 (1986) (citing Hans v. Louisiana, 134 U.S. 1 (1890)). Thus, absent waiver, consent to suit or congressional abrogation of immunity, a suit in which the State of Oklahoma or one of its agencies or departments is named as a defendant is generally prohibited by the Eleventh Amendment, Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100 (1984), and "[t]his bar exists whether the relief sought is legal

or equitable." Papasan, 478 U.S. at 276 (citing Pennhurst, 465 U.S. at 100-01).

Because the State of Oklahoma and the State of Oklahoma Workers' Compensation Court have neither waived nor consented to suit in federal court and there has been no congressional abrogation of immunity, the Court finds that Defendants are immune from suit on Plaintiff's claims for alleged violations of the Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution. Consequently, dismissal of Plaintiff's action against Defendants under section 1915(d) is required. See, e.g., McKinney v. State of Okl., Dep't of Human Services, 925 F.2d 363 (10th Cir. 1991).¹

To the extent Plaintiff seeks relief in his Complaint against his legal counsel, Seacat & Seacat and/or Wyatt, Austin & Associates, for alleged violations of the Fifth, Sixth, Ninth and Fourteenth Amendments (even though they are not named Defendants), the Court finds that dismissal is warranted. Plaintiff has failed to allege any facts tending to show that Defendants were "state actors." Section 1983 of Title 42 of the United States Code provides that "[e]very person" who acts "under color of" state law to deprive another of constitutional rights shall be liable in a suit for damages. 42 U.S.C. § 1983. To state a claim under § 1983, a plaintiff must show in part that the alleged violation of

¹From examining Plaintiff's "Petition for Writ of Certiorari," it appears that Plaintiff is actually seeking a review by this Court of the decisions of the Supreme Court of Oklahoma and the Worker's Compensation Court in regard to his worker's compensation claim. The Court, however, is not an appellate court for the State of Oklahoma. Any appeal from the Supreme Court of Oklahoma is to the Supreme Court of the United States of America.

a constitutional right was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). In Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 928 (1982), the United States Supreme Court noted that if a defendant's conduct satisfies the requirement of "state action" under the fourteenth amendment, it also satisfies the "under the color of state law" requirement for § 1983. The Lugar Court made clear that for conduct of a private party to constitute "state action" it must be "fairly attributable to the State." 457 U.S. at 937. Thus, to be a state actor, the defendant must be a state official or have acted together with or obtained significant aid from a state official or have done something otherwise chargeable to the state. Id.

In this case, Plaintiff has failed to allege any facts which demonstrates that the alleged conduct of Seacat & Seacat and/or Wyatt, Austin & Associates constitutes state action. Indeed, the Court notes that "[t]he conduct of counsel, either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of a section 1983 violation." Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990). Therefore, Plaintiff's claims for alleged violations of the Fifth, Sixth, Ninth and Fourteenth Amendments against Defendants are subject to dismissal under section 1915(d).

Finally, to the extent Plaintiff alleges a claim against the State of Oklahoma, the State of Oklahoma Worker's Compensation Court, Seacat & Seacat and Wyatt, Austin & Associates for violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq.,

the Court finds that such claim is frivolous. Plaintiff's claim lacks arguable basis either in fact or law.

Based upon the foregoing, the Court DISMISSES Plaintiff's Petition for Writ of Certiorari or Complaint pursuant to 28 U.S.C. § 1915(d).

ENTERED this 6th day of February, 1995



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE FEB 07 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
TULSA DIVISION

FILED

FEB - 7 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

RALPH L. JONES CO. INC.,

Defendant.

CIVIL ACTION NO.

94-C-427-BK

CONSENT DECREE

THIS CONSENT DECREE is made and entered into by and between the Equal Employment Opportunity Commission and Ralph L. Jones Co. Inc. and owner Ralph L. Jones.

On April 28, 1994, the Equal Employment Opportunity Commission instituted suit against Ralph L. Jones Co. Inc. in the United States District Court for the Northern District of Oklahoma, Civil Action No. 4:94-CV-427-K, based upon charges of discrimination filed by Charging Parties Lalana Taber, Jeffrey Wiseman and Dan Davis against Ralph L. Jones Co. Inc.

The above referenced action alleges that Ralph L. Jones Co. Inc. violated Sections 703(a) and 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a) and 2000e-3(a), by subjecting Cherl Womack and Kathy Pierce to sexual harassment and by discharging Jeffrey Wiseman, Dan Davis and Cherl Womack in retaliation for having engaged in a protected activity.

The parties hereto desire to compromise and settle the differences embodied in the aforementioned lawsuit, and intend that

9

the terms and conditions of the compromise and settlement be set forth in this Consent Decree ("Consent Decree").

NOW, THEREFORE, in consideration of the mutual promises and agreements set forth herein, the sufficiency of which is hereby acknowledged, the parties agree as follows, the Court finds appropriate, and therefore, it is ORDERED, ADJUDGED AND DECREED that:

1. This Consent Decree resolves all issues raised in EEOC Charge Nos. 31B-91-0252; 31B-91-0268 and 311-92-0014. This Decree further resolves all issues in the Complaint filed by the EEOC in this case. The EEOC waives further claims and/or litigation on all issues raised in the above referenced charges and Complaint. The Commission does not waive processing or litigating charges other than the above referenced charge.

2. Ralph L. Jones personally consents to jurisdiction of this Court.

3. The parties agree that this Consent Decree does not constitute an admission by Ralph L. Jones Co. Inc. or Ralph L. Jones, owner, of any violation of Title VII of the Civil Rights Act of 1964.

4. Ralph L. Jones, owner, agrees that all hiring and promotion practices and all other terms and conditions of employment at Jones & Hall Inc., the company in which Mr. Jones currently serves as president, shall be maintained and conducted in a manner which does not discriminate on the basis of sex in violation of Title VII of the Civil Rights Act of 1964.

5. Ralph L. Jones, owner, agrees to continue to implement the current written sexual harassment policy at Jones & Hall Inc., and to provide a copy of such policy to all employees at the time of hire. Ralph L. Jones also agrees to maintain the written policy in a place accessible to all employees.

6. Ralph L. Jones, owner, agrees that there shall be no discrimination or retaliation of any kind against any person because of opposition to any practice declared unlawful under Title VII, or because of the filing of a charge; giving testimony or assistance or participating in any manner in any investigation, proceeding or hearing under Title VII.

7. Ralph L. Jones, owner, agrees to post and keep posted in conspicuous places on the premises of Jones & Hall Inc., the EEOC's poster entitled: "Equal Employment Opportunity is the Law," appended hereto as Attachment A.

8. Ralph L. Jones Co. Inc. and Ralph L. Jones, owner, agree that in furnishing oral or written references to prospective employers for Jeffrey Wiseman or Dan Davis, Ralph L. Jones Co. Inc. and Ralph L. Jones, owner, will mention only the job positions held by Mr. Wiseman and Mr. Davis, the dates of their employment and the last rate of pay. Further, no mention shall be made of this lawsuit or the underlying issues.

9. Ralph L. Jones, owner, agrees to furnish to the EEOC a written letter of recommendation to prospective employers for Cheryl Womack and Kathy Pierce. This written letter of recommendation will provide the job positions held by Ms. Womack and Ms. Pierce,

dates of their employment and last rate of pay. The written letters of recommendation will also state that the job performance of Ms. Womack and Ms. Pierce was good, and that they were released only because of completion of the project for which they were hired. The written letters of recommendation are appended hereto as Attachments B and C. With regard to any inquiries by employers, no mention shall be made of this lawsuit or the underlying issues.

10. Ralph L. Jones Co. Inc. agrees to make a total award of backpay plus interest to Cheryl Womack, Kathy Pierce, Jeffrey Wiseman and Dan Davis in the amount of \$2,500.00. In consideration of the existing circumstances under which the defendant, Ralph L. Jones Co. Inc. is no longer operating as a business, and is presently without employees, the Court finds it appropriate and the parties therefore have agreed that the defendant will pay the aggrieved individuals a total amount of \$625.00 each and will issue Internal Revenue Service 1099 forms reflecting the payment. The aggrieved individuals will therefore be responsible for making any and all payments of federal and state taxes and any other income reporting obligations as may be required by law. The total award will be paid as follows:

- A. Total payment of \$400.00 on or before February 15, 1995. This will include checks of \$100.00 each written by Ralph L. Jones to Cheryl Womack, Kathy Pierce, Jeffrey Wiseman and Dan Davis.
- B. Total Payment of \$400.00 on or before March 15, 1995. This will include checks of \$100.00 each written by Ralph L. Jones to Cheryl Womack, Kathy Pierce, Jeffrey Wiseman and Dan Davis.
- C. Total payment of \$400.00 on or before April 15, 1995. This will include checks of \$100.00 each written by Ralph

L. Jones to Cheryl Womack, Kathy Pierce, Jeffrey Wiseman and Dan Davis.

- D. Total payment of \$400.00 on or before May 15, 1995. This will include checks of \$100.00 each written by Ralph L. Jones to Cheryl Womack, Kathy Pierce, Jeffrey Wiseman and Dan Davis.
- E. Total payment of \$400.00 on or before June 15, 1995. This will include checks of \$100.00 each written by Ralph L. Jones to Cheryl Womack, Kathy Pierce, Jeffrey Wiseman and Dan Davis; and
- F. Total payment of \$500.00 on or before July 15, 1995. This will include checks of \$125.00 each written by Ralph L. Jones to Cheryl Womack, Kathy Pierce, Jeffrey Wiseman and Dan Davis.

Each check will be made payable to the individual payee. The checks shall be delivered to the EEOC, Attn: Suzanne M. Anderson, 207 South Houston Street, Dallas, Texas 75202 by U.S. Certified Mail, return receipt requested.

11. If Ralph L. Jones Co. Inc. or Ralph L. Jones, owner, fails to tender payment or otherwise fails to timely comply with the terms of paragraphs 8 and 9, Ralph L. Jones Co. Inc. or owner Ralph L. Jones, shall:

- a. Pay interest at the rate calculated pursuant to 26 U.S.C. Section 6621(b) on any untimely or unpaid amounts; and
- b. Bear any additional costs incurred by the plaintiff caused by the non-compliance or delay of the defendant.

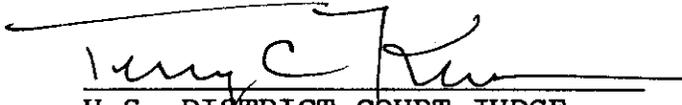
12. No party shall contest the validity of this Consent Decree nor the jurisdiction of the federal district court to enforce this Consent Decree and its terms or the right of any party to bring an enforcement action upon breach of any term of this Consent Decree by any party. Nothing in this Decree shall be

construed to preclude the Commission from enforcing this Decree in the event that Ralph L. Jones Co. Inc. or Ralph L. Jones fails to perform the promises and representations contained herein. The Commission shall determine whether Ralph L. Jones Co. Inc. has complied with the terms of this Consent Decree and shall be authorized to seek compliance with the Consent Decree through civil action in the United States District Court.

13. The parties agree to pay their own costs associated with this action.

14. The term of this Decree shall be for one (1) year.

SO ORDERED, ADJUDGED AND DECREED this 6th day of February, 1995.


U.S. DISTRICT COURT JUDGE

Agreed to in form and content:

FOR THE EEOC:



JEFFREY C. BANNON
Regional Attorney

ROBERT A. CANINO
Supervisory Trial Attorney
Oklahoma Bar No. 011782

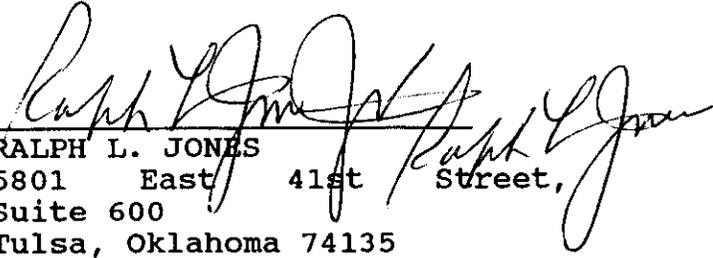
SUZANNE M. ANDERSON

Sr. Trial Attorney
Texas Bar No. 14009470

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
207 South Houston Street
Dallas, Texas 75238

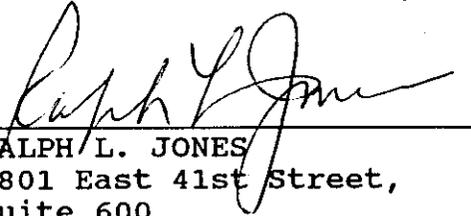
(214) 655-3334

FOR RALPH L. JONES CO. INC.:



RALPH L. JONES
5801 East 41st Street,
Suite 600
Tulsa, Oklahoma 74135

FOR RALPH L. JONES, OWNER



RALPH L. JONES
5801 East 41st Street,
Suite 600
Tulsa, Oklahoma 74135

Ralph L. Jones Co., Inc.
5801 East 41st Street
Tulsa, Oklahoma

February 1, 1995

TO WHOM IT MAY CONCERN:

This is to verify that Cheryl Womack was employed by Ralph L. Jones Co., Inc. for several months during 1990 and 1991. Her position was that of laborer, specifically assigned to housekeeping to clean apartments after renovation. Cheryl performed the functions of her job fully. The reason for termination of her employment was that the job completed in the normal course of renovation and her services were no longer required.

Sincerely,

Ralph L. Jones

ATTACHMENT
B

Ralph L. Jones Co., Inc.
5801 East 41st Street
Tulsa, Oklahoma

February 1, 1995

TO WHOM IT MAY CONCERN:

This is to verify that Kathy Pierce was employed by Ralph L. Jones Co., Inc. for several months during 1990 and 1991. Her position was that of laborer, specifically assigned to housekeeping to clean apartments after renovation. Kathy performed the functions of her job fully. The reason for termination of her employment was that the job completed in the normal course of renovation and her services were no longer required.

Sincerely,

Ralph L. Jones

ATTACHMENT
C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE FEB 0 1995

FILED

FEB - 6 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

BRENDA HAMPTON-HIGGINS,)
)
Plaintiff,)
)
vs.)
)
WARREN PETROLEUM COMPANY,)
CHEVRON USA, INC., and)
JOHN KLEIN,)
)
Defendant.)

No. 95 C ~~00109K~~ 19 K

NOTICE OF DISMISSAL

Comes now the Plaintiff Brenda Hampton-Higgins by and through her attorney of record Melissa K. Sawyer and hereby dismisses, without prejudice of refiling, her cause of action against Defendants Warren Petroleum Company, Chevron U.S.A. Inc., and John Klein.

Respectfully submitted,

Melissa K Sawyer
Larry L. Oliver, OBA #6769
Melissa K. Sawyer, OBA #14855
Larry L. Oliver & Associates
2211 E. Skelly Dr.
Tulsa, OK 74105-5905

4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEB 6 1995 *fl*

LEE "EAUL" HARDT,)
)
) Petitioner,)
)
 vs.)
)
) RON CHAMPION, et al.,)
)
) Respondents.)

Richard J. Cook, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 92-C-941-C

ENTERED ON DOCKET
DATE 2-7-95

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has reversed the conviction in Petitioner's state appeal, that Petitioner has subsequently entered a voluntary plea in the State District court in which he was charged, and therefore, that his appellate delay claim is now moot.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 6th day of February, 1995.

H. Dale Cook
H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT



FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FEB - 6 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MEMOREX-TELEX, a Delaware Corporation,)
)
)
Plaintiff,)
)
v.)
)
THREE WAY CORPORATION, a California Corporation, d/b/a 3-WAY VAN LINES; 3-WAY VAN LINES; SANJAYLYN COMPANY, a Partnership, and INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation,)
)
)
Defendants.)

Case No. 91-C-955 B

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COME NOW the parties, Memorex-Telex, Three Way Corporation, SanJaylyn Company and Insurance Company of North America, and hereby stipulate that the Defendant, Insurance Company of North America, is dismissed without prejudice.

RHODES, HIERONYMUS, JONES, TUCKER & GABLE

BY Robert A. Redemann

ROBERT P. REDEMANN
2800 Bank IV Center, 15 W. 6th Street
Tulsa, OK 74119-5430
(918) 582-1173
ATTORNEYS FOR MEMOREX-TELEX CORPORATION

~~DYKEMAN, WILLIAMSON & WILLIAMSON, INC.~~

BY Previously Dismissed - No Longer A Party
WILBURN D. WILLIAMSON
TRACY A. PARKS
The Circle Building, Suite 107
5101 North Classen Boulevard
Oklahoma City, OK 73118-4471
(405) 848-7946
ATTORNEYS FOR THREE-WAY CORPORATION

FELDMAN, HALL, FRANDEN, WOODARD & FARRIS

BY Jacqueline O. Haglund
JOHN R. WOODARD, III
JACQUELINE O'NEIL HAGLUND
Park Centre - Suite 1400
525 South Main
Tulsa, OK 74103-4409
(918) 583-7129
ATTORNEYS FOR SANJAYLYN COMPANY

FENTON, FENTON, SMITH, RENEAU & MOON

BY Laurie W. Jones
LAURIE W. JONES
SHERRY L. SMITH
One Leadership Square, Suite 800
211 North Robinson
Oklahoma City, OK 73102
405/235-4671
ATTORNEYS FOR INSURANCE COMPANY OF
NORTH AMERICA

ENTERED ON DOCKET
DATE ~~FEB 07 1995~~

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA **FILED**

TRANSAMERICA COMMERCIAL)
FINANCE CORPORATION, a)
Delaware corporation,)
)
Plaintiff,)
)
v.)
)
BRADLEY W. WEBB, an)
individual, TRI-COUNTY)
INVESTMENTS, INC., an)
Oklahoma corporation,)
and WEBB BOATS, INC., an)
Oklahoma corporation,)
)
Defendants.)

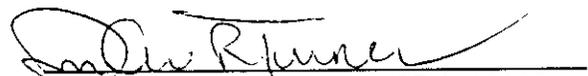
FEB - 6 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-941-B

STIPULATION FOR DISMISSAL

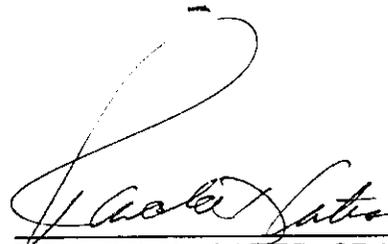
Plaintiff Transamerica Commercial Finance Corporation and Defendants Bradley W. Webb, Tri-County Investments, Inc. and Webb Boats, Inc. hereby stipulate, pursuant to Fed.R.Civ.Pro. Rule 41(a)(1), to the dismissal of this action which each party to bear its own costs.



ANDREW R. TURNER, OBA #9125

of
CONNER & WINTERS
A Professional Corporation
2400 First National Tower
15 East 5th Street
Tulsa, Oklahoma 74103-4391
(918) 586-5711

Attorneys for Plaintiff
TRANSAMERICA COMMERCIAL
FINANCE CORPORATION



RONALD D. CATES, OBA #1565
Suite 680, ParkCentre
525 South Main
Tulsa, Oklahoma 74103
(918) 582-7447

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

INTER CHEM COAL COMPANY,)
a wholly owned subsidiary of)
INTERNATIONAL CHEMICAL)
COMPANY, INC., an Oklahoma)
corporation,)
)
Plaintiff,)
)
vs.)
)
W.K. JENKINS,)
)
Defendant.)

FILED

FEB - 6 1995 *lc*

Richard M. Lawrence, Clerk
No. 94-16-5200-DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 2-7-95

JUDGMENT

This matter came before the Court for consideration of the plaintiff's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the plaintiff and against the defendant W.K. Jenkins in the amount of \$150,000.00, and post-judgment interest at the rate of 7.03 percent per annum.

ORDERED this 6 day of February, 1995.

Terry C. Kern
TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

INTER CHEM COAL COMPANY,)
a wholly owned subsidiary of)
INTERNATIONAL CHEMICAL)
COMPANY, INC., an Oklahoma)
corporation,)
)
Plaintiff,)
)
vs.)
)
W.K. JENKINS,)
)
Defendant.)

FILED

FEB - 6 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 94-C-280-K

ENTERED ON DOCKET

DATE 2-7-95

ORDER

Before the Court is the motion of the plaintiff for summary judgment. Plaintiff sues defendant as surety on a performance bond executed to the benefit of plaintiff. On December 8, 1992, plaintiff entered into a contract with Industrial Management Services (IMS) whereby IMS would conduct surface mining and reclamation operations on a coal lease held by plaintiff. A performance bond, to insure timely compliance with all reclamation responsibility, was executed on the same day in the amount of \$150,000, with IMS as principal and defendant as surety. IMS defaulted on the agreement, and plaintiff now proceeds against defendant on the bond.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment.

Plaintiff moves for judgment, asserting defendant's liability under the plain terms of the bond, which is attached as Exhibit B to its motion. Defendant has filed a response pro se, although subsequently counsel has entered an appearance in his behalf, in which he contends he has no obligation under the bond by reason of "non-payment and lack of consideration." By this plaintiff apparently means (1) IMS did not pay the bond premium and (2) plaintiff received nothing for his execution of the bond as surety.

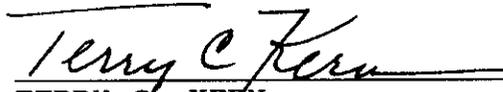
Plaintiff responds with an affidavit of Martha Starr, Vice President of coal marketing for plaintiff, who states plaintiff never received notice from defendant or IMS that they considered the bond ineffectual by reason of failure to pay premium. The Court need not consider any issue of notice. "The fact that the principal has not paid the premium on the bond does not furnish the surety with a defense in [a] proceeding brought to collect on the bond." Beekwilder v. Beekwilder, 102 A.2d 642 (N.J.App.1953).

Plaintiff also attaches to its response (#13) an Exhibit B, which plaintiff states "are printouts supplied by the Department of Mines through its Applicant Violator System. Plaintiff interprets the printout to have the following significance: "Jenkins is an owner, officer, or director of Green Acres, which in turn owns fifty percent (50%) of IMS." (Response at 9). Plaintiff's argument is that the benefit directed to IMS through the suretyship contract also qualifies as consideration for defendant's obligation, as part owner of IMS. At the Pre-Trial conference held in this case, defendant's counsel did not contest the authenticity of Exhibit B.

Evidence was further presented showing that plaintiff has expended funds exceeding the \$150,000 bond limitation.

It is the Order of the Court that the motion of the plaintiff for summary judgment is hereby GRANTED.

ORDERED this 6 day of February, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES DWIGHT KELLEY,)
)
 Plaintiff,)
)
 vs.)
)
 DENNY HIGHT, et al.,)
)
 Defendants.)

No. 94-C-1083-K

FILED

FEB -2 1995

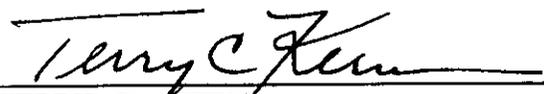
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

On November 21, 1994, Plaintiff, pro se, filed a civil rights complaint and a motion for leave to proceed in forma pauperis. On November 28, 1994, the Clerk informed the Plaintiff that his complaint was not on the form approved for use by the United States Court of Appeals for the Tenth Circuit, and that marshall forms, summons, and additional copies were necessary in order to proceed with service of process in this case. The Plaintiff has not submitted the requisite documents.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis (doc. #2) is **granted** and that Plaintiff's action is hereby **dismissed without prejudice for lack of prosecution.**

SO ORDERED THIS 1 day of February, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

The Defendants cite the relationship between the instant dispute over the Policy and the Plaintiff's previous bankruptcy to press for a reference to the bankruptcy court. The basic chronology of that bankruptcy is as follows. On July 13, 1988, an involuntary petition in bankruptcy was filed under Chapter 7 against Plaintiff's husband, George Shipman. On September 30, 1988 an involuntary petition was filed under Chapter 7 against the Plaintiff. These two cases were consolidated on January 9, 1989. A final decree was entered with regard to these bankruptcies on March 25, 1993, and the case was closed.

Shipman contends in her state court lawsuit that a \$36,000 loan against the policy's cash value caused it to "collapse" or terminate without her knowledge or that of her husband, the original owner of the policy. She sued Mass Mutual and George Willard for their acts or failure to act with regard to the collapse of the Policy.

The Defendants argue that the claims asserted by the Plaintiff relate to her bankruptcy estate and thus vest this Court with federal question jurisdiction. 28 U.S.C. § 157. First, it should be noted that the face of Plaintiff's state court petition does not rely in any way on federal law. Instead, the claims are grounded in tort and contract law of Oklahoma. Second, it is necessary to determine whether Shipman's claims are related to her Chapter 7 bankruptcy in order to determine whether this Court has jurisdiction pursuant to 28 U.S.C § 157. Typically, courts determine relatedness by examining whether the outcome of the

proceeding could conceivably have any effect on the estate being administered in bankruptcy. The Tenth Circuit has held:

[T]he proceeding is related to the bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action in any way, thereby impacting on the handling and administration of the bankruptcy estate.

In re Gardner, 913 F.2d 1515, 1518 (10th Cir. 1990). Although this test is broad in nature, it is not broad enough to encompass this dispute.

The outcome of this dispute could have no effect on the estate administered in the bankruptcy proceeding. Mass Mutual paid the bankruptcy trustee to release any claims the estate had relating to the policy. If the plaintiff's claim was an asset of the estate, then the Trustee would have no right to assert a further claim. According to the release, the Trustee discharged Mass Mutual of and from any and all claims which the Estate ever had, now has, or may ever have, by virtue of the company's payment of \$22,148. Br. of Mass. Mutual in Opp. to Mot. to Rem., Exh. C. A "related" proceeding must have some effect on administration of the debtor's estate to be within the bankruptcy judge's jurisdiction to hear it. Zweygart v. Colorado National Bank of Denver, 52 B.R. 229 (D. Colo. 1985).

Defendants assert that Plaintiff wrongly declared the insurance policy as an exempt asset by representing that the "Policy has no cash value." (Def't.'s Brief in Opp. of P's Mot. to Rem. at 2). According to the Defendants, Plaintiff's failure to accurately identify the Mass Mutual Policy renders her claim of

exemption void. Since the exemption is allegedly void, the Defendants believe the bankruptcy action should be reopened. However, the cash value of the policy is not at issue in the underlying lawsuit nor is the validity of the exemption. Instead, this case involves classic state law claims arising from rights pursuant to the contractual relationship established by Plaintiff and the Defendants. In light of the release entered into by the Trustee, this action can have no bearing on the administration of the assets in the bankruptcy.

This Court does not find that Plaintiff's actions relate to the bankruptcy proceeding and thus remand the action to state court in the District Court of Pawnee County. While the Court has discretion to award attorney's fees and costs associated with removal pursuant to 28 U.S.C. § 1447(c), the Court declines to award such fees since the previous bankruptcy provided a supportable basis to argue for removal.

ORDERED this 2 day of February, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED O. JOCKET

DATE FEB 06 1995

FILED
FEB 08 1995
Richard L. Lawrence, Clerk
U.S. DISTRICT COURT
TULSA, OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALOHA SURFACE,)
)
 Plaintiff,)
)
 vs.)
)
 AMERICAN AIRLINES, INC.,)
)
 Defendant.)

Case No. 93-C-1110-K

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a Dismissal With Prejudice of Plaintiff's causes of action in this case against Defendant, American Airlines, Inc.

DATED this 18 day of Jan, 1995.

Aloha Surface
Aloha Surface
Plaintiff

BRIGGS & SMITH
By: Robert L. Briggs
Robert L. Briggs
3105 East Skelly Drive
Suite 600
Tulsa, OK 74105
(918) 743-8598

Attorneys for Plaintiff

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By: Kathy R. Neal
Kathy R. Neal
320 South Boston Ave., Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Defendant,
American Airlines, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 01 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM,)
INC., an Oklahoma corporation,)

Plaintiff,)

vs.)

RENTAL MOTORSPORTS, INC.)
and STEVEN R. PREWITT,)

Defendants.)

Case No. 94-C-1057 *BE*

ENTERED ON DOCKET

DATE FEB 03 1995

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Thrifty Rent-A-Car System, Inc. and Defendants, Rental Motorsports, Inc. and Steven R. Prewitt, hereby stipulate that the above captioned case should be dismissed with prejudice, in its entirety, with each party to bear its own costs and attorney's fees.

Respectfully submitted,



Michael J. Gibbens, OBA #3339
Jon Ed Brown, OBA #16186

- Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
Suite 500
321 South Boston
Tulsa, Oklahoma 74103-3313
(918) 592-9800

ATTORNEYS FOR PLAINTIFF, THRIFTY
RENT-A-CAR SYSTEM, INC.

Therese Buthod

Therese Buthod, OBA #10752

James R. Gotwals, OBA #3499

JAMES R. GOTWALS & ASSOCIATES, INC.

525 South Main, Suite 1130

Tulsa, OK 74103-4512

(918) 599-7088

ATTORNEYS FOR DEFENDANTS

plw
1-31

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
FEB 03 1995
DATE

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
ELMER RANDLE; WANDA RANDLE;)
STATE OF OKLAHOMA ex rel)
OKLAHOMA TAX COMMISSION;)
COUNTY TREASURER, Tulsa)
County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
)
Defendants.)

FILED
FEB - 2 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 94-C 892K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 1st day
of February, 1995. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Loretta F. Radford, Assistant United States
Attorney; the Defendants, **County Treasurer, Tulsa County,**
Oklahoma, and **Board of County Commissioners, Tulsa County,**
Oklahoma, appear by Dick A. Blakeley, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, **State of**
Oklahoma ex rel Oklahoma Tax Commission, appears by its Assistant
General Counsel, Kim D. Ashley; and the Defendants, **Elmer Randle**
and Wanda Randle, appear not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendant, **Elmer Randle,** was served
with process on December 15, 1994; the Defendant, **Wanda Randle,**
was served with process on December 13, 1994; and the Defendant,
State of Oklahoma ex rel Oklahoma Tax Commission, acknowledged

~~NO~~
~~_____~~
~~_____~~
~~_____~~
~~_____~~

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receipt of Summons and Complaint via Certified Mail on September 21, 1994.

The Court further finds that the Defendants, **Elmer Randle and Wanda Randle**, are husband and wife.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on September 28, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on October 7, 1994; and that the Defendants, **Elmer Randle and Wanda Randle**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty (20), Block Two (2), CHANDLER-FRATES SECOND ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

A/K/A 3301 North Lansing Avenue, Tulsa, Oklahoma 74106-1934

The Court further finds that on March 17, 1988, the Defendant, Elmer Randle, executed and delivered to FIRSTIER MORTGAGE CO. his mortgage note in the amount of \$33,650.00, payable in monthly installments, with interest thereon at the rate of ten and one-half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Elmer Randle,

a single person, executed and delivered to FIRSTIER MORTGAGE CO. a mortgage dated March 17, 1988, covering the above-described property. Said mortgage was recorded on March 22, 1988, in Book 5088, Page 1183, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 6, 1988, FirstTier Mortgage Co., (formerly known as Realbanc, Inc.) assigned the above-described mortgage note and mortgage to LEADER FEDERAL SAVINGS & LOAN ASSOCIATION. This Assignment of Mortgage was recorded on October 31, 1988, in Book 5137, Page 381, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 28, 1990, LEADER FEDERAL BANK FOR SAVINGS F/K/A LEADER FEDERAL SAVINGS AND LOAN ASSOCIATION assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT, 451 SEVENTH STREET, SW, WASHINGTON, DC 20410, his successors in office and assigns. This Assignment of Mortgage was recorded on December 6, 1990, in Book 5292, Page 1664, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 1, 1990, the Defendant, Elmer Randle, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on January 1, 1991.

The Court further finds that on December 13, 1993, the Defendant, Wanda Randle, filed her petition for relief in the United States Bankruptcy Court for the Northern district of

Oklahoma, case number 93-B-3978-W, which was discharged on April 6, 1994, and closed on June 9, 1994.

The Court further finds that the Defendant, Elmer Randle, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Elmer Randle**, is indebted to the Plaintiff in the principal sum of \$52,423.18, plus interest at the rate of 10.5 percent per annum from June 16, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action, plus \$25.80 in fees for service of Summons and Complaint.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$17.00 which became a lien on the property as of June 23, 1994; a lien in the amount of \$16.00 which became a lien as of June 25, 1994; a lien in the amount of \$16.00 which became a lien as of June 26, 1992, and a lien in the amount of \$2.00 which became a lien as of July 5, 1989. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, has a lien on the property which is the subject matter of this action by virtue of a tax warrant, number ITI9202163101, in the amount of \$3,136.25, plus interest, penalties, and costs, which became a lien as of November 24, 1992; a second tax warrant, number ITI9202163100, in the amount of \$3,136.25, was also filed on November 24, 1992, however, the Defendant is only liable for one such warrant; a tax warrant in the amount of \$424.86, plus interest, penalties, and costs, which became a lien as of January 27, 1993; a tax warrant in the amount of \$92.19, plus interest, penalties, and costs, which became a lien as of May 13, 1993; and a tax warrant in the amount of \$385.37, plus interest, penalties, and costs, which became a lien as of November 4, 1993. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, **Elmer Randle and Wanda Randle**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, **Elmer Randle**, in the

principal sum of \$52,423.18, plus interest at the rate of 10.5 percent per annum from June 16, 1994 until judgment, plus interest thereafter at the current legal rate of 7.03 percent per annum until paid, plus the costs of this action in the amount of \$25.80, fees for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$51.00 for personal property taxes for the years 1988, and 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, have and recover judgment in rem in the amount of \$4,038.67, plus the costs of this action, for tax warrants.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Elmer Randle, Wanda Randle, and the Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Elmer Randle**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to

Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$18.00, personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of \$3,653.30, plus accrued and accruing interest, for state taxes currently due and owing.

Fifth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$16.00, personal property taxes which are currently due and owing.

Sixth:

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of \$385.37, plus accrued and accruing interest, for state taxes currently due and owing.

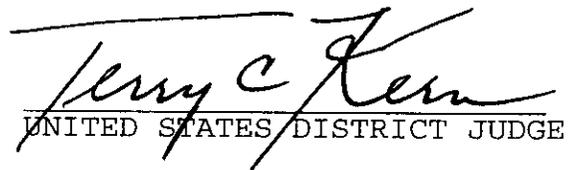
Seventh:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$17.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

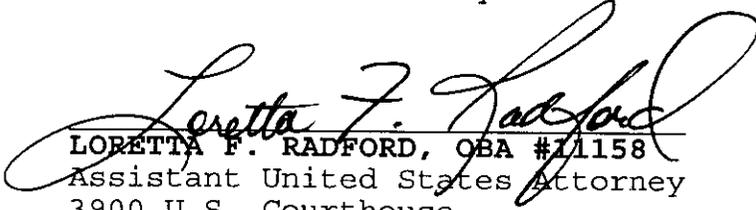
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

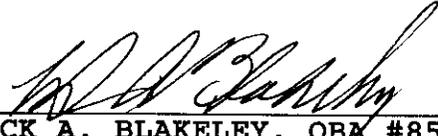
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

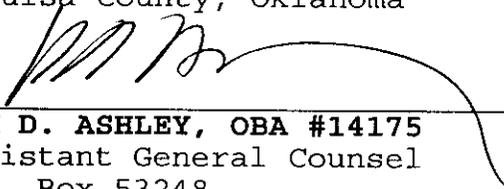

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma


KIM D. ASHLEY, OBA #14175
Assistant General Counsel
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Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma ex rel
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94-C 892K

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON BOOKET
DATE FEB 03 1995

HARRY LEVAN,)
)
 Plaintiff,)
)
 vs.)
)
 CENTENNIAL LIFE INSURANCE)
 COMPANY, a foreign insurance)
 corporation, and DAVE JOHNSON,)
 CLU, ChFC, agent,)
)
 Defendants.)

Case No. 93 C1069 K ✓

FILED

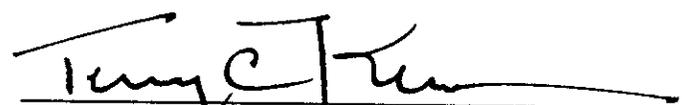
FEB - 2 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

NOW on this the 30th day of September, 1994, Plaintiff's request to remand his case against Defendant Dave Johnson, Agent back to state court comes on before me the undersigned Judge of the District Court, it is so ordered. Said order is memorialized in a Civil Minute dated October 12, 1994.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's case against Defendant Dave Johnson, only, is remanded to Tulsa District Court.


HONORABLE TERRY C. KERN
Judge of the District Court

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED & INDEXED
DATE FEB 03 1995

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ELMER RANDLE; WANDA RANDLE;)
 STATE OF OKLAHOMA ex rel)
 OKLAHOMA TAX COMMISSION;)
 COUNTY TREASURER, Tulsa)
 County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
)
 Defendants.)

FILED

FEB - 2 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 94-C 892K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 1st day of February, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, appears by its Assistant General Counsel, Kim D. Ashley; and the Defendants, **Elmer Randle and Wanda Randle**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Elmer Randle**, was served with process on December 15, 1994; the Defendant, **Wanda Randle**, was served with process on December 13, 1994; and the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, acknowledged

NOTED
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
IMMEDIATELY

receipt of Summons and Complaint via Certified Mail on September 21, 1994.

The Court further finds that the Defendants, **Elmer Randle and Wanda Randle**, are husband and wife.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on September 28, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on October 7, 1994; and that the Defendants, **Elmer Randle and Wanda Randle**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty (20), Block Two (2), CHANDLER-FRATES SECOND ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

**A/K/A 3301 North Lansing Avenue, Tulsa, Oklahoma
74106-1934**

The Court further finds that on March 17, 1988, the Defendant, **Elmer Randle**, executed and delivered to **FIRSTIER MORTGAGE CO.** his mortgage note in the amount of \$33,650.00, payable in monthly installments, with interest thereon at the rate of ten and one-half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, **Elmer Randle**,

a single person, executed and delivered to FIRSTIER MORTGAGE CO. a mortgage dated March 17, 1988, covering the above-described property. Said mortgage was recorded on March 22, 1988, in Book 5088, Page 1183, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 6, 1988, FirstTier Mortgage Co., (formerly known as Realbanc, Inc.) assigned the above-described mortgage note and mortgage to LEADER FEDERAL SAVINGS & LOAN ASSOCIATION. This Assignment of Mortgage was recorded on October 31, 1988, in Book 5137, Page 381, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 28, 1990, LEADER FEDERAL BANK FOR SAVINGS F/K/A LEADER FEDERAL SAVINGS AND LOAN ASSOCIATION assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT, 451 SEVENTH STREET, SW, WASHINGTON, DC 20410, his successors in office and assigns. This Assignment of Mortgage was recorded on December 6, 1990, in Book 5292, Page 1664, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 1, 1990, the Defendant, Elmer Randle, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on January 1, 1991.

The Court further finds that on December 13, 1993, the Defendant, Wanda Randle, filed her petition for relief in the United States Bankruptcy Court for the Northern district of

Oklahoma, case number 93-B-3978-W, which was discharged on April 6, 1994, and closed on June 9, 1994.

The Court further finds that the Defendant, Elmer Randle, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Elmer Randle**, is indebted to the Plaintiff in the principal sum of \$52,423.18, plus interest at the rate of 10.5 percent per annum from June 16, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action, plus \$25.80 in fees for service of Summons and Complaint.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$17.00 which became a lien on the property as of June 23, 1994; a lien in the amount of \$16.00 which became a lien as of June 25, 1994; a lien in the amount of \$16.00 which became a lien as of June 26, 1992, and a lien in the amount of \$2.00 which became a lien as of July 5, 1989. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, has a lien on the property which is the subject matter of this action by virtue of a tax warrant, number ITI9202163101, in the amount of \$3,136.25, plus interest, penalties, and costs, which became a lien as of November 24, 1992; a second tax warrant, number ITI9202163100, in the amount of \$3,136.25, was also filed on November 24, 1992, however, the Defendant is only liable for one such warrant; a tax warrant in the amount of \$424.86, plus interest, penalties, and costs, which became alien as of January 27, 1993; a tax warrant in the amount of \$92.19, plus interest, penalties, and costs, which became a lien as of May 13, 1993; and a tax warrant in the amount of \$385.37, plus interest, penalties, and costs, which became a lien as of November 4, 1993. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, **Elmer Randle and Wanda Randle**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, **Elmer Randle**, in the

principal sum of \$52,423.18, plus interest at the rate of 10.5 percent per annum from June 16, 1994 until judgment, plus interest thereafter at the current legal rate of 7.03 percent per annum until paid, plus the costs of this action in the amount of \$25.80, fees for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$51.00 for personal property taxes for the years 1988, and 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, have and recover judgment in rem in the amount of \$4,038.67, plus the costs of this action, for tax warrants.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Elmer Randle, Wanda Randle, and the Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Elmer Randle**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to

Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$18.00, personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of \$3,653.30, plus accrued and accruing interest, for state taxes currently due and owing.

Fifth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$16.00, personal property taxes which are currently due and owing.

Sixth:

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of \$385.37, plus accrued and accruing interest, for state taxes currently due and owing.

Seventh:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$17.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

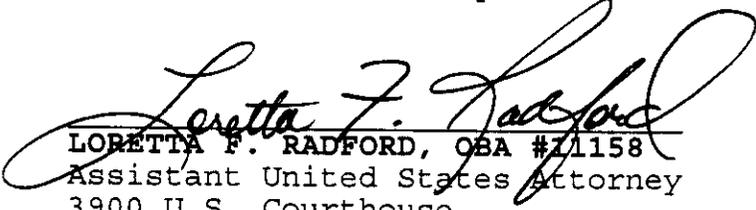
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

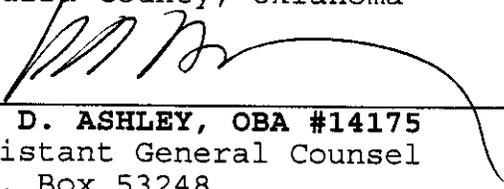
UNITED STATES DISTRICT JUDGE

APPROVED:

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Judgment of Foreclosure
Civil Action No. 94-C 892K

LFR:lg

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 1 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ERHAN OZEY,)
)
 Appellant,)
)
 v.)
)
 MARGARET LYNN KEELING, et al,)
)
 Appellee,)

94-C-0799-B

ENTERED ON DOCKET

DATE FEB 02 1995

ORDER

Now before the Court is Plaintiff-Appellees Motion To Dismiss Appeal (docket #2). Appellee filed the motion on September 12, 1994. To date, Appellant has not responded in this Court. Therefore, the issue is whether the appeal should be dismissed under Local Rule 7.1. That rule states that "response briefs shall be filed within (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested."

In this case, Debtor-Appellant Erhan Ozey filed bankruptcy in the United States Court for the Northern District of Oklahoma. Ozey requested that his debts to Appellees be discharged, but the Bankruptcy Court denied that request. As a result, Ozey filed a Notice of Appeal (docket #1) on August 18, 1994.

Appellees then filed the instant motion on September 12, 1994.¹ Nearly five months later -- well past the 15-day time limit under Local Rule 7.1 -- Ozey still has not

¹ In the Motion To Dismiss, Appellees argued that Ozey had not properly designated the record for the purposes of the appeal.

responded to the motion in this Court.² Given the fact that Ozey has given the Court no sufficient reason as to why the case should not be dismissed, the Motion To Dismiss (docket #2) is deemed confessed and is hereby GRANTED.

SO ORDERED THIS 15th day of Feb., 1995.


THOMAS R. BRET, CHIEF JUDGE
UNITED STATES DISTRICT COURT

² J. Phillip Adamson, Ozey's attorney, admitted he had not filed a response. His explanation was that his client could not, at that time, afford a trial transcript. The transcript, Adamson said, was essential to his client's appeal of the bankruptcy decision. Adamson cited no other reason for the failure to respond or, in the alternative, filing a motion to extend the time to file a response.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 CHARLES G. TANNER; NORMA J.)
 TANNER aka NORMA TANNER;)
 STATE OF OKLAHOMA ex el)
 OKLAHOMA TAX COMMISSION;)
 AETNA FINANCE COMPANY;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)

Defendants.

FILED

FEB 1 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 94-C 989B

EMPOWERED ON LOCKET

DATE 2/2/95

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 1st day of Feb.,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, **Charles G. Tanner, Norma J. Tanner aka Norma Tanner, and Aetna Finance Company**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Norma J. Tanner aka Norma J. Tanner** will hereinafter be referred to as

("Norma J. Tanner"); and that the Defendants, **Charles G. Tanner and Norma J. Tanner** are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendants, **Charles G. Tanner and Norma J. Tanner**, each waived service of Summons on October 21, 1994, which was filed on October 28, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint via Certified Mail on October 24, 1994; and that the Defendant, **Aetna Finance Company**, acknowledged receipt of Summons and Complaint via Certified Mail on November 2, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma,** and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on November 1, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on November 25, 1994; and that the Defendants, **Charles G. Tanner, Norma J. Tanner, and Aetna Finance Company**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

The West Half (W¹/₂) of Lot One (1) and the West Half (W¹/₂) of the North 70 feet of Lot Two (2), Block Twenty-eight (28), in the Town of Red Fork, now an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on April 3, 1979, Stephen E. Cates and Sharon Ann Greany, executed and delivered to WORTHEN FIRST MORTGAGE COMPANY their mortgage note in the amount of \$32,500.00, payable in monthly installments, with interest thereon at the rate of nine and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Stephen E. Cates, a single person and Sharon Ann Greany, a single person, executed and delivered to WORTHEN FIRST MORTGAGE COMPANY a mortgage dated April 3, 1979, covering the above-described property. Said mortgage was recorded on April 6, 1979, in Book 4391, Page 602, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 14, 1979, Worthen First Mortgage Company assigned the above-described mortgage note and mortgage to Worthen Bank & Trust Company, N.A. This Assignment of Mortgage was recorded on July 20, 1979, in Book 4414, Page 1858, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 25, 1988, Worthen Bank & Trust, N.A. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development and unto its successors and assigns. This Assignment of Mortgage was recorded on December 1, 1988, in Book 5142, Page 2638, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Charles G. & Norma Tanner, Husband and Wife, are the current record owners of the property by virtue of a General Warranty Deed dated March 25, 1980, and recorded on March 27, 1980 in Book 4466, Page 1184, in the records of Tulsa County, Oklahoma. The Defendants, Charles G. Tanner and Norma J. Tanner, are the current assumptors of the subject indebtedness.

The Court further finds that on August 12, 1988, the Defendants, Charles G. Tanner and Norma J. Tanner, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on December 18, 1989, June 29, 1990, and June 26, 1991.

The Court further finds that on August 19, 1992, the Defendants, Charles G. Tanner and Norma J. Tanner, filed their petition for Chapter 7 relief, Case Number 92-02941, in the United States Bankruptcy Court for the Northern District of Oklahoma; which was discharged on December 22, 1992, and subsequently closed on April 13, 1993.

The Court further finds that the Defendants, Charles G. Tanner and Norma J. Tanner, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Charles G. Tanner and Norma J. Tanner**, are indebted to the Plaintiff in the principal sum of \$45,246.36, plus interest at the rate of 9.5 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, has a lien on the subject property by virtue of a Tax Warrant, in the amount of \$141.19, plus interest, penalties, and costs, and filed on January 31, 1991; and a Tax Warrant in the amount of \$799.93, plus interest, penalties, and costs, and filed on February 23, 1993. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, **County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma**, claim no right, title or interest in the subject real property

The Court further finds that the Defendants, **Charles G. Tanner and Norma J. Tanner**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Charles G. Tanner and Norma J. Tanner**, in the principal sum of \$45,246.36, plus interest at the rate of 9.5 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 7.34 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, have and recover judgment in rem in the amount of \$941.12, plus penalties and interest, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Charles G. Tanner, Norma J. Tanner, Aetna Finance Company, County**

Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Charles G. Tanner and Norma J. Tanner**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of \$941.12, plus accrued and accruing interest for state taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

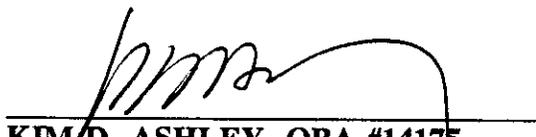
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Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94-C 989B

LFR:lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LIBERTY MUTUAL INSURANCE COMPANY,)
UNITED PARCEL SERVICE OF AMERICA,)
INC., and ALKO CORPORATION,)

Plaintiffs,)

vs.)

KAN-ARK INDUSTRIES, INC., now)
KAI, INC., and AETNA CASUALTY &)
SURETY COMPANY OF ILLINOIS,)

Defendants/Third-Party)
Plaintiffs,)

vs.)

BUILDERS STEEL CO., INC., and)
CONTINENTAL INSURANCE COMPANY,)

Third-Party Defendants.)

CASE NO. 93-C-1105-B ✓

FILED

FEB 01 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ORDER

ENTERED ON DOCKET

DATE FEB 02 1995

This matter comes on for consideration of Third-Party Defendants', Builders Steel Co., Inc. and Transcontinental Insurance Company, (collectively, Builders) Motion for Summary Judgment against Defendants and Third-Party Plaintiffs, Kan-Ark Industries, Inc. now KAI, Inc. (Kan-Ark) and Aetna Casualty & Surety Company Of Illinois (Aetna), and against Plaintiffs, Liberty Mutual Insurance Company, (Liberty), United Parcel Service Of America, Inc., (UPS), and Alko Corporation, (Alko), (docket entry # 52). Also for consideration is UPS's and Alko's Cross Motion for Summary Judgment against Builders (docket entry # 61) and Kan-Ark's Motion for Partial Summary Judgment against UPS, Alko and Builders

(docket entry # 66).

This case arose from a 1988 construction project, involving the erection of a UPS parcel outlet in Tulsa, Oklahoma, owned by Alko, a subsidiary of UPS. Kan-Ark, a contractor, agreed in writing to construct and erect the building. Kan-Ark, as allowed by its construction contract with UPS/Alko, subcontracted work on the project with Builders. An employee of Builders, Mark Allen Reynolds (Reynolds), was allegedly severely injured, on August 11, 1988, when the building, partially erected, collapsed.

Liberty issued a general liability policy to Alko and UPS, Aetna issued a liability policy for Kan-Ark and Third Party Defendant Transcontinental Insurance Company issued a liability policy for Builders.

Reynolds filed suit in Tulsa County District Court against multiple defendants including Alko and UPS in August, 1990. The case now pends as to Alko, UPS and Mansur-Daubert-Strella, Inc., (Mansur) who designed the building, and RB&W Corporation (RB&W), the latter sued on a theory of product liability (alleged defective steel). Neither Kan-Ark nor Builders¹ were sued in the state court action. Reynolds is not a party to the present action. Transcontinental, Builders liability carrier, has been dismissed by stipulation between Builders and Kan-Ark.

In an earlier motion (docket entry # 34) Plaintiffs sought declaratory judgment against Kan-Ark, seeking a finding that the

¹ Builders was presumably not sued because of suit protection by having provided Workers' Compensation insurance which was availed of by the injured worker, Reynolds.

indemnity clause contained in the contract between Alko and Kan-Ark was valid and enforceable against Kan-Ark and that Kan-Ark is obligated to defend and indemnify and save harmless Plaintiffs herein for all claims, damages, losses, verdicts, judgments, costs and expenses including attorney's fees arising out of the state court action.

Kan-Ark responded, arguing it had no obligation to defend UPS and Alko for the alleged negligence of RB&W or Mansur; that the policy issued by Aetna to Kan-Ark obligated Aetna to defend and indemnify Kan-Ark against the claims of UPS and Alko. Kan-Ark also argued that UPS and Alko were immune from any liability to Reynolds and that Alko and UPS are therefor not entitled to indemnity from Kan-Ark. Kan-Ark asked for summary judgment against Plaintiffs but had filed no formal motion. The Court declined to consider Kan-Ark's informal request and Kan-Ark eventually filed its formal motion. (docket entry # 66).

In its prior Order the Court, concluding that none of the authorities cited by Plaintiffs stood for the proposition that past, already allegedly committed negligence may be readily indemnified by an agreement that references the "the execution of the work provided for in this contract", granted partial summary judgment for Plaintiffs. That part of the summary judgment denied is now the subject of Kan-Ark's motion for summary judgment (# 66).

The Court's earlier Order noted that UPS and Alko were each sued in state court based on an allegation of their failure:

"to adequately supervise the erection of said United Parcel Service (U.P.S.) building at the location of 71st

and South Garnett in Tulsa County, Oklahoma, Defendant[s] knew or should have known that such negligence would likely result in injury to persons, including the Plaintiff."

and that UPS was sued in state court on two additional theories, which were defective design of the building and failure to comply with minimum industry standards in design.

The Court, rejecting Kan-Ark's argument that since RB & W (the supplier of the steel for the building) and Mansur (the designer of the building allegedly in consort with UPS) were sued in state court on these same theories along with UPS/Alko, that Kan-Ark had no indemnification liability to Plaintiffs regarding these theories because neither UPS nor Alko could be held liable at law for the negligence of RB & W and Mansur. This Court, rejecting such argument, concluded that such view failed to consider the possibility of joint liability on the part of UPS and Mansur for defective design, or joint tortfeasor exposure for alleged non-compliance with industry standards by UPS in specifying the alleged inferior steel supplied by RB & W. The Court further rejected Kan-Ark's argument that it had no indemnification exposure to UPS and Alko because UPS/Alko could not be held liable in the state court action for the reason that Reynolds' claim is exclusively under the Workers' Compensation Statutes making the claims not within the scope of the indemnity clause. The Court, noting Kan-Ark's acknowledgement that workers' compensation immunity would not extend to the "negligent preparation of design plans and specifications" because "building plans were simply not part of the "work" covered under the agreement", recognized such position as

appropriate under the record herein but concluded that alleged negligent supervision of the construction/erection was part of the "work" contemplated by the contract.

The Court further concluded that Kan-Ark had defense/indemnification liability to the Plaintiffs for alleged negligent supervision if Plaintiffs suffered such exposure in the state court action but that Kan-Ark had no potential indemnification exposure to Plaintiffs regarding alleged negligent design and/or failure to comply with industry standards in the design. The Court granted in part and denied in part Plaintiffs' Motion For Summary Judgment as to Kan-Ark. As stated, Kan-Ark now seeks summary judgment on that portion of the motion not granted.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Winton Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

"[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein the Court stated that:

" . . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

The Court concludes Kan-Ark should be and is GRANTED partial summary on the issues that Kan-Ark has no potential indemnification exposure to Plaintiffs regarding alleged negligent design and/or failure to comply with industry standards in the design.

The Court next considers Builders Motion for Summary Judgment against Kan-Ark/Aetna and against Plaintiffs, Liberty and UPS/Alko (docket entry # 52). Also for consideration is UPS's and Alko's Cross Motion for Summary Judgment against Builders (docket entry # 61).

It is Plaintiffs' theory that Builders, in its subcontract with Kan-Ark, assumed all the indemnity liability imposed upon Kan-Ark by its contract with UPS/Alko. The Court should once again examine the contractual agreement between UPS/Alko and Kan-Ark which provides, in part, as follows:

"Article 14. Indemnity and Insurance

a. Indemnity.

* * *

. . . All references to Owner in this article shall include United parcel Service of America, Inc., . . . and each of [its] subsidiaries.

* * *

Contractor hereby assumes the entire responsibility and liability for any and all damage and injury of any kind and nature whatsoever, caused by, resulting from, arising out of, incidental to, or accruing in connection with the execution of the work provided for in this contract. Such damage and injury shall include damage to property, including the work, theft, and injury to all persons, including employees of contractor and its subcontractors, including death resulting therefrom. In the case of an injury to an employee of Contractor or its subcontractors, this provision shall apply whether such injury is sustained while at the premises where work under this Contract is conducted or elsewhere, provided that such employee is engaged in the performance of work under this Contract.

Contractor agrees to indemnify and save harmless owner, its agents, servants and employees from and against any and all claims, liabilities, loss and expenses by reason of any liability imposed by law upon owner for any above described damage or injury, however such may be caused, including but not limited to such damage or injury as is caused by the sole or concurrent negligence of owner, its agents, servants or employees, whether active or passive negligence, and whether based upon any alleged breach of any statutory duty, or administrative regulation, or otherwise. This indemnity obligation shall not be limited in any way by benefits payable under workers' compensation acts, disability benefits acts, or other employee benefit acts."

As already seen the Court previously agreed that Fretwell vs. Protection Alarm Co., 764 P.2d 149 (Okla.1988) and its precursors held that agreements, which have the result of indemnifying one against his own negligence, are, subject to strict construction of the agreement itself, enforceable. See, Sinclair Oil & Gas vs. Brown, 333 F.2d 967 (10th Cir.1964); Colorado Milling & Elevator Co. vs. Chicago, Rock Island & Pacific RR Co., 382 F.2d 834 (10th Cir.1967); Transpower Constructors vs. Grand River Dam Auth., 905 F.2d 1413 (10th Cir.1990); Chicago, Rock Island & Pacific RR Co. vs. Davila, 489 P.2d 760 (Okla.1971).

Notwithstanding, the Court further concluded that none of these authorities stood for the proposition that past, already allegedly committed negligence may be readily indemnified by an agreement that references "the execution of the work provided for in this contract." Id. Fretwell held that a contract may validly provide for the indemnification of one against, or relieve him from liability for, his own future acts of negligence provided the indemnity against such negligence is made unequivocally clear in the contract but was no authority for indemnification of past acts of alleged negligence.

Thus, the Court's earlier ruling was that the Kan-Ark indemnification of UPS/Alko was not total despite the rather all inclusive tenor of the indemnity language.

The Court next turns to the subcontract between Kan-Ark and Builders which provides, in part, as follows:

"Section 5. Contractor and Sub-Contractor agree to

be bound by the terms of the contract between the Owner and the Contractor, the general conditions, special conditions, the plane(sic), drawings and specifications as far as applicable to this sub-contract. The Sub-Contractor also agrees:

- (a) To be bound to the Contractor by the terms of the contract between Owner and Contractor, and the general conditions, special conditions, plans, drawings and specifications, constituting a part thereof, and to assume toward Contractor all the obligations and responsibilities that Contractor, by those documents, assumes toward the Owner insofar as they are applicable to the work to be performed under this Sub-Contract."

Builders argues that the phraseology "as far as applicable to this sub-contract" and "insofar as they are applicable to the work to be performed under this Sub-Contract" limits the exposure which Builders assumed under the sub-contract. Further, Builder avers that both the Oklahoma Supreme Court and the Tenth Circuit Court of Appeals have ruled that, unless it is "unequivocally clear", indemnity agreements will not be construed to obligate the indemnitor to indemnify the indemnitee against losses arising from the indemnitee's own negligence. Webb v. Western Carter County Water and Sewage Corp., 575 P.2d 124, 126 (Okla.App.1977); Transpower Constructors v. G.R.D.A., supra . Also see, Sinclair Oil & Gas Co. v. Brown, 220 F.Supp. 106, 110, (E.D.Okla.1963), affirmed, 333 F.2d 967 (10th Cir.1964), cited with approval in Cooper v. American Auto Ins. Co., 978 F.2d 602, 614 (10th Cir.1992).

The Court agrees with the principal rule espoused by these authorities. In the Court's view the subcontract between Builders and Kan-Ark did not make it "unequivocally clear" that Builders was indemnifying Kan-Ark for Kan-Ark's own negligence as did the main

contract between Kan-Ark and UPS/Alko, which obligated Kan-Ark viz-a-viz Kan-Ark's own negligence.² The Court concludes Builders is, however, liable under the subcontract for that indemnification which Kan-Ark assumed, including Kan-Ark's obligation to indemnify UPS/Alko for UPS/Alko's own negligence.

The Court's conclusion that Builders, through the subcontract, obligated itself for general indemnification of Kan-Ark (except for Kan-Ark's own negligence) is supported by U.S. v. Hardage, 985 F.2d 1427 (10th Cir.1993) and cases cited therein, particularly Transpower Constructors vs. Grand River Dam Auth., supra, and Colorado Milling & Elevator Co. vs. Chicago, Rock Island & Pacific Railroad Co., supra. In the Court's view the subcontract between Builders and Kan-Ark contained sufficient "all inclusive" language to effect general indemnification except, as stated, for Kan-Ark's own negligence.

The Court next considers Builders issue that it is excluded from any liability for negligence by the Oklahoma Workers' Compensation Act and Plaintiffs', Liberty, UPS and Alko, cross-motion for summary judgment on the same issue.

The Court recognizes that Builders' compliance with the Workers' Compensation Act, by providing such insurance for the use

² The contract between UPS/Alko and Kan-Ark specifically refers to UPS/Alko's own negligence as follows:

"Contractor agrees to indemnify and save harmless owner, . . . from and against any and all claims, liabilities, loss and expenses by reason of any liability imposed by law upon owner for any above described damage or injury, however such may be caused, including but not limited to such damage or injury as is caused by the sole or concurrent negligence of owner . . ."

and benefit of the injured employee Reynolds, grants it protection from a direct suit by Reynolds. However, the existence of such statutory immunity does not preclude Builders, as happened herein, from obligating itself by an independent contract of indemnification. Harter Concrete Products, Inc. vs. Harris, 592 P.2d 526 (Okla.1979); Peak Drilling Company v. Halliburton Oil Well Cementing Company, 215 F. 2d 368 (10th Cir.1954).

The Court further concludes that Builders has no direct liability to UPS/Alko because the subcontract is not a third-party beneficiary contract. The Court concludes Builders' indemnity liability is to Kan-Ark who in turn has indemnity liability exposure to UPS/Alko but Builders' indemnity does not run directly to UPS/Alko.

SUMMARY

In summary, the Court GRANTS partial summary judgment in favor of Kan-Ark (docket entry # 66) on the issues that Kan-Ark has no potential indemnification exposure to Plaintiffs regarding alleged negligent design and/or failure to comply with industry standards in the design. Further, the Court DENIES Builders motion for summary judgment (docket entry # 52) EXCEPT THAT it GRANTS partial summary judgment in favor of Builders on the issue of its liability for the negligence of Kan-Ark, the Court being of the view that Builders has no indemnity liability for Kan-Ark's own negligence under the subcontract herein. The Court DENIES Plaintiffs' motion for summary judgment (docket entry # 61) on the issue of the direct indemnity liability of Builders to Plaintiffs Liberty, UPS and Alko

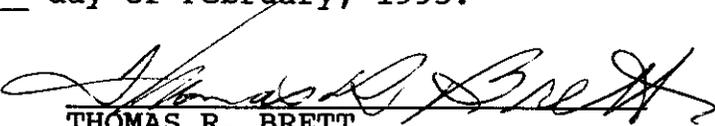
but GRANTS Plaintiffs' alternative prayer that UPS/Alko is entitled to indemnity from Kan-Ark and Kan-Ark is entitled to indemnity from Builders (except as to Kan-Ark's own negligence).

This matter is set for jury trial on July 17, 1995, at 9:30 a.m.

Prior thereto the parties shall comply with the following schedule:

April 7, 1995	Exchange names and addresses of all witnesses in writing
April 21, 1995	Discovery cut-off
June 19, 1995	Filing of agreed pretrial order. All exhibits to be identified in such order and exchanged. If parties desire a Pretrial Conference prior to this date file appropriate timely application.
July 3, 1995	Designation of depositions, interrogatories or admissions followed by counter-designation thereof seven days later (7-10-95)
July 12, 1995	Requested voir dire, requested instructions and any trial brief a party wishes to file
July 17, 1995	Jury trial at 9:30 A.M.

IT IS SO ORDERED this 1ST day of February, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE FEB 02 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 01 1995

Richard W. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TOBIN DON LEMMONS,
Plaintiff,

vs.

PAWNEE COUNTY SHERIFF'S
DEPARTMENT, et al.,

Defendants.

No. 94-C-0006-E

ORDER

On July 18, 1994, the Court notified the Plaintiff that in ten days it would dismiss this case without prejudice as to the Oklahoma Highway Department for lack of service. The Plaintiff has not objected.

ACCORDINGLY, IT IS HEREBY ORDERED that the Oklahoma Highway Department is hereby **dismissed without prejudice** for lack of service. See Fed. R. Civ. P. 4(m).

SO ORDERED THIS 3/27 day of January, 1995.


JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEBORAH F. KENT,)
)
 Plaintiff,)
)
 v.)
)
 DONNA E. SHALALA,)
 SECRETARY OF HEALTH AND)
 HUMAN SERVICES,)
)
 Defendant,)

Case No. 93-C-653-B

FILED

FEB 0 1 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ORDER ENTERED ON DOCKET
FEB 0 2 1995

The Court has for its consideration the objection of the Plaintiff, Deborah F. Kent, to the Report and Recommendation of the United States Magistrate Judge filed November 11, 1994, in which the Magistrate Judge recommended that the Secretary's decision be affirmed.

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services (Secretary) denying Plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and for supplemental security income benefits under §§ 1602 and 1614 of the Social Security Act, as amended.

The Magistrate correctly restricted his review to a determination of whether there is substantial evidence in the record to support the final decision of the Secretary that Plaintiff is not disabled within the meaning of the Social Security Act. The Secretary's findings stand if they are supported by "such

relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

In the present case the Plaintiff's claim failed at the fifth step in the five-step process for evaluating a disability claim¹. The Secretary found that although plaintiff was unable to return to her past relevant work as a nurse's aide, waitress, and motel maid, she was not disabled because there were a significant number of jobs in the national economy she could perform.

The Plaintiff contends that the Magistrate Judge erred:

¹The social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does Claimant's impairment prevent him from doing any other work available in the national economy?

20 C.F.R. § 404.1520 (1983). See Generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

1. In concluding that the Plaintiff failed to meet the obesity impairment listed in 20 C.F.R. § 404 Sbprt. P. Appendix 1 Parts A and B;
2. In concluding that the Plaintiff's complaints of pain may amount to mere malingering;
3. In his interpretation of the Plaintiff's examination by Dr. Pollock on May 29, 1990;
4. In page four of his report and recommendations by failing to take notice of important information in Dr. Schneider's report of May 7, 1990;
5. In basing his report at page 11, in part, on his conclusion that "Claimant has failed to follow her doctor's advice to lose weight" (report 11); and
6. In his recommendation that the Secretary was not in error by disregarding the opinion of Dr. Milo.

Failure to Meet the Obesity Impairment

The Plaintiff contends that she was measured, without shoes, and weighed by Dr. Zumwalt on May 17, 1991. He found the Plaintiff to be 62 3/4 inches tall and 247 pounds which would qualify her as obese pursuant to 20 C.F.R. § 404 Sbprt. P. Appendix A and B².

Plaintiff's medical records show, however, that her weight has fluctuated from a high of 248 pounds on July 11, 1991 (TR. 272), to a low of 224 on February 20, 1992 (TR 310), with various weights in between which do not qualify her as obese at a height of 62 3/4 inches. The Magistrate Judge used this medical evidence, which clearly shows that the Plaintiff failed to meet the obesity impairment in the regulations for any extended period, as a proper

²Table II--Women

Height Without Shoes (inches)	Weight (pounds)
62	242
63	250
64	258

basis for his decision that the Plaintiff failed to meet the obesity impairment. The Plaintiff failed to demonstrate by medically acceptable clinical and laboratory diagnostic techniques that she qualifies as obese or that her combined ailments are equivalent to the listing for obesity.

Subjective Pain

Plaintiff also contends that there is no medical evidence to support the Magistrate Judge's conclusion that the Plaintiff's complaints of pain are fabricated. The Plaintiff claims that the Magistrate Judge alone came to this medical conclusion which is not supported by substantial medical evidence.

The Magistrate Judge agreed with the Secretary's conclusion that Plaintiff's allegations of pain lacked credibility because the medical reports do not suggest that claimant has a condition that would cause the severe pain Plaintiff contends she feels. This Court makes the same conclusion.

Dr. Bartlett reported that a mylogram showed that "nerve roots appear unremarkable." (TR 287). Plaintiff has been told she can resume normal activities. (TR 281). Except for Dr. Milo, her doctors have concluded that the Plaintiff can return to light, sedentary work. (TR 254-256). The Plaintiff has used little pain medication and her doctors have not prescribed assistive devices. Dr. Zumwalt's and Dr. Willis' comments about the Plaintiff's pain complaints and possible malingering are telling. (TR 264, 272).

Interpretation of Dr. Pollock's Examination of 5/29/90

The Plaintiff, on May 5, 1990, told Dr. Pollock that she

"hasn't any difficulty sitting." (TR 255). Plaintiff contends that the Magistrate Judge misinterpreted this statement and failed to make note of two additional statements in the same report that are obviously contradictory to the statement that Plaintiff "hasn't any difficulty sitting."

The contradictory nature of the Plaintiff's statements are not controlling here. Neither is the Magistrate Judge's interpretation of these statements. Dr. Pollock's completed evaluation stated that the Plaintiff did have a physical condition which substantially limited her employment capabilities, but did not prevent her from being employed. (TR 254). He also stated in his 5/29/90 report that she could perform "light, sedentary" work. (TR 254).

Dr. Pollock's conclusions, which clearly indicate that the Plaintiff can perform a limited range of light sedentary work, are more convincing than the possible contradiction of Plaintiff's statements. Therefore, the Magistrate Judge did not err in his evaluation of Dr. Pollock's May 5, 1990, report of the Plaintiff's physical condition.

Failure to Take Notice of Important Information in Dr. Schneider's

Report of 5/7/1990

Plaintiff contends that the Magistrate Judge erred in not giving import to the gravity of Dr. Schneider's actual diagnosis which was severe and permanent osteoarthritis of the spine. (TR 259).

Dr. Schneider, in his May 7, 1990, report, did note that the

Plaintiff had disc disease of the spine and disc degeneration from T-12 through 14-5. There was no mention however, of any bulging disc and he said that everything else was normal. (TR 259). Dr. Schneider did not make a determination as to Plaintiff's ability to work; instead he referred the Plaintiff to Dr. Pollock who determined that she was able to perform a limited range of light sedentary work. (TR 254).

By combining the findings of both Dr. Schneider and Dr. Pollock the Magistrate Judge did properly evaluate the gravity of the Plaintiff's disc degeneration. The Magistrate Judge concluded that the Plaintiff obviously has a degenerative disc problem which limits but does not totally preclude her from working. This Court agrees with the Magistrate Judge's conclusion and finds that it was based on substantial medical evidence.

Failure to Lose Weight

Plaintiff contends that the Magistrate Judge erred in basing his decision, in part, on his conclusion that "Claimant has failed to follow her doctor's advice and lose weight." (report 11). Plaintiff further contends that the Magistrate Judge correctly listed the four elements that must be met before denying benefits for failure to follow prescribed treatment, but he failed to offer any analysis to their application to the Plaintiff's case.

The Magistrate Judge did not base his decision solely on the fact that the Plaintiff failed to lose weight. The Magistrate Judge's decision was based on the Plaintiff's failure to follow her doctor's advice, part of which was to lose weight. The Plaintiff

was also advised to exercise as instructed by physical therapists, and enroll in chronic pain syndrome therapy. The treatment prescribed clearly meets the elements listed by the Magistrate Judge and require nothing more than a reading of the elements to see how they apply to the Plaintiff's case. No further analysis of the elements is required to determine that Plaintiff's failure to follow her doctor's advice in this situation precludes her from being found disabled.

Dr. Milo's Opinion

Dr. Milo is one of the Plaintiff's treating physician whose report, the Plaintiff contends, was disregarded by the Secretary and the Magistrate Judge. Plaintiff also contends that it is impermissible for the Secretary to reject the opinion of a treating Physician that the Plaintiff was disabled.

A treating Physician's opinion is binding on the fact finder unless it is contradicted by "substantial evidence," and the opinion is entitled to extra weight due to the physician's greater familiarity with the Plaintiff's medical situation. Kemp v. Bowen, 816 F.2d 1469, 1476 (10th Cir. 1987); Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). Those conclusions can only be disregarded if specific, legitimate reasons are given by the Secretary. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984).

The Secretary did not err in disregarding the opinion of Dr. Milo that the Plaintiff cannot work. Dr. Milo reviewed a myelogram of the Plaintiff's back and stated in notes that it was "obvious" that the Plaintiff was unable to do any work due to a bulging disk.

(TR 294). Dr. Bartlett reviewed the same myelogram report and found the Plaintiff could resume normal activities gradually. (TR 281). The radiologist and Dr. Bartlett made no significant findings and both failed to mention a bulging disc which Dr. Milo asserted was present. (TR 294).

The opinion of any physician, including a treating physician, may be rejected when it is brief, conclusory or unsupported by the objective evidence of record as a whole. Bernal v. Bowen, 851 F.2d 294, 301 (10th Cir. 1988). Dr. Milo's opinion is that the Plaintiff's back problem, which prevents her from working, will not get better because of a bulging disc. (TR 294). Dr. Milo was the only one to spot or make mention of a bulging disc in Plaintiff's back. He has no conclusive objective medical evidence to support his opinion, and none of the Plaintiff's other treating physicians agree with Dr. Milo's opinion. Dr. Milo's opinion was correctly disregarded because it is unsupported by the objective medical evidence.

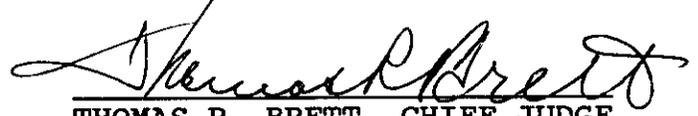
Conclusion

The Administrative Law Judge considered the evidence of all the doctors, and his own observations, and concluded that the Plaintiff was not afflicted with a disabling impairment. The Secretary considered all the evidence and the Magistrate Judge correctly found that substantial evidence supported the Secretary's ruling.

Therefore, this Court agrees with the Magistrate Judge's Report and Recommendation, and orders that the decision of the

Secretary be AFFIRMED. Plaintiff's Motion to Consider Additional Evidence is denied as moot.

IT IS SO ORDERED THIS 1st day of Feb., 1995.


THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 1 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

EDMOND L. QUALLS,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES, Donna Shalala, Secretary,)
)
 Defendant.)

93-C-1146-B

ENTERED BY CLERK

DATE FEB 02 1995

JUDGMENT

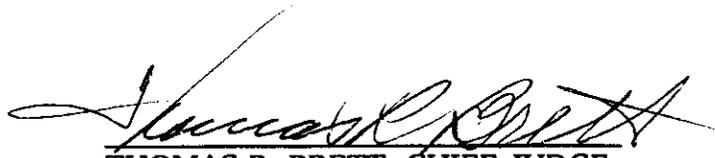
This action having come before the court for consideration, IT IS ORDERED,
ADJUDGED AND DECREED that judgment is entered as follows:

1. The ALJ shall order Mr. Qualls to be examined by a consulting physician who is a hand specialist.
2. The ALJ shall hold a supplemental hearing where the vocational expert and the claimant will again testify.
3. The ALJ shall then re-examine the record and determine whether Mr. Qualls can return to work.¹

The case is remanded per the Order of 2 - 1, 1995.

¹ The undersigned finds that substantial evidence does support the finding that Qualls is not impaired because of his back pain and/or his mental impairments. The question, on remand, is whether the hand impairments alone or in combination with the other impairments render him disabled under the Social Security Act.

DATED THIS 15th day of Feb, 1995.

A handwritten signature in black ink, appearing to read "Thomas R. Brett", written in a cursive style.

THOMAS R. BRET, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 1 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

EDMOND L. QUALLS,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, Donna Shalala, Secretary,

Defendant.

93-C-1146-B

ENTERED ON DOCKET

DATE FEB 12 1995

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed January 9, 1995 in which the Magistrate Judge recommended that the case be remanded with the following instructions:

1. The ALJ shall order Mr. Qualls to be examined by a consulting physician who is a hand specialist.
2. The ALJ shall hold a supplemental hearing where the vocational expert and the claimant will again testify.
3. The ALJ shall then re-examine the record and determine whether Mr. Qualls can return to work.¹

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

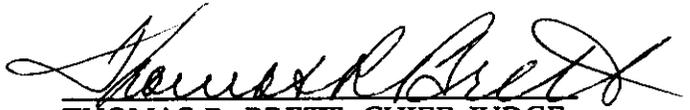
After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and

¹ The undersigned finds that substantial evidence does support the finding that Qualls is not impaired because of his back pain and/or his mental impairments. The question, on remand, is whether the hand impairments alone or in combination with the other impairments render him disabled under the Social Security Act.

hereby is adopted and affirmed.

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

SO ORDERED THIS 1st day of Feb., 1995.



THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT